Supreme Court, U.S.
FILED
93 1513 MAR 21 1994
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

KURT HENRY VAN ENGEL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

STEPHEN E. KRAVIT
Counsel of Record
JANICE A. RHODES
KRAVIT, GASS & WEBER, S.C.
825 North Jefferson
Milwaukee, Wisconsin 53202
(414) 271-7100
Counsel for Petitioner

March 1994

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

QUESTION PRESENTED

The prosecution launched a sting operation without any sound basis against a lawyer for a client under investigation and pursued it for two years without any evidence or leads to evidence of illegal conduct, impeding the effectiveness of counsel on behalf of the client and causing significant delay and expense for the client. The question presented is:

> Can a prosecutor in a complicated white collar investigation wrongfully interfere with a putative defendant's relationship with his lawyer without violating the Fifth or Sixth Amendments, and without consequence to his case?

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT	3
A. The Investigation of Van Engel's Lawyer	3
B. The Rulings Below	8
REASONS FOR GRANTING THE WRIT	11
I. The Decision of the Court of Appeals is Erroneous	12
II. The Question Presented is Important	18
CONCLUSION	22

APPENDIX

Opinion of the Court of Appeals	1a
Opinion of the District Court	14a

TABLE OF AUTHORITIES

Cases	PAGE
Chandler v. Fretag, 348 U.S. 3 (1954)	14, 15
Cobbledick v. United States, 309 U.S. 323 (1940)	12, 13
Continental Oil Co. v. United States, 330 F.2d 347 (9th Cir. 1964)	16
Edwards v. Arizona, 451 U.S. 477 (1981)	15
In re Grand Jury Subpoenas, 902 F.2d 244 (4th Cir. 1990)	16
In re Groban, 352 U.S. 330 (1957)	15
In re Schmidt, 775 F.2d 822 (7th Cir. 1985)	15
In re Taylor, 567 F.2d 1183 (2d Cir. 1977)	15
Klopfer v. North Carolina, 386 U.S. 213 (1967)	13
McNeil v. Wisconsin, 111 S. Ct. 2204 (1991)	15
Powell v. Alabama, 287 U.S. 45 (1932)	14
United States v. Andrews, 824 F. Supp. 1273 (N.D. Ill. 1993)	19
United States v. Boyd, 833 F. Supp. 1277 (N.D. Ill. 1993)	19
United States v. Burnside, 824 F. Supp. 1215 (N.D. Ill. 1993)	19
United States v. Caputo, 633 F. Supp. 1479 (E.D. Pa. 1986), *rev'd*, 825 F.2d 754 (4th Cir. 1987)	20
United States v. Hammad, 858 F.2d 834 (2d Cir. 1988)	16
United States v. Isgro, 751 F. Supp. 846 (C.D. Cal. 1990), *rev'd*, 974 F.2d 1091 (9th Cir. 1992)	20

United States v. Lopez, 765 F. Supp. 1433 (N.D. Cal. 1991), *rev'd*, 989 F.2d 1032 (9th Cir. 1993) . 19

United States v. Lovasco, 431 U.S. 783 (1977) ... 13, 14

United States v. MacDonald, 456 U.S. 1 (1982) .. 13

United States v. Marion, 404 U.S. 307 (1971) 13, 14

United States v. Marshank, 777 F. Supp. 1507 (N.D. Cal. 1991) 19

United States v. Morrison, 449 U.S. 361 (1981) .. 17

United States v. Omni International Corp., 634 F. Supp. 1414 (D. Md. 1986) 20

United States v. Pardue, 765 F. Supp. 513 (W.D. Ark. 1991), *rev'd*, 983 F.2d 835 (8th Cir.), *cert. denied*, 113 S. Ct. 3043 (1993) 20

United States v. Ramsey, 785 F.2d 184 (7th Cir.), *cert. denied*, 476 U.S. 1186 (1986) 15

United States v. Williams, 112 S. Ct. 1735 (1992) . 18, 19

Upjohn v. United States, 449 U.S. 383 (1981) 16

Wayte v. United States, 470 U.S. 598 (1985) 17

Weatherford v. Bursey, 429 U.S. 545 (1977) 17

Constitution, Statutes and Rules

U.S. Constitution, Article I 8

U.S. Constitution, Amendment V 2, 13, 14, 15, 22

U.S. Constitution, Amendment VI .. 2, 10, 13, 14, 17, 22

18 U.S.C. § 982 7

18 U.S.C. § 3231 3

18 U.S.C. § 3731 3

28 U.S.C. § 1254(1) 2

Fed. R. Crim. P. 2 13

Fed. R. Crim. P. 6 18

Other Authorities

David J. Fried, *Too High a Price for Truth: The Exception to the Attorney-Client Privilege for Contemplated Crimes and Fraud*, 64 N.C.L. Rev. 443 (1986) 21

Bennett L. Gershman, *The New Prosecutors*, 53 U. Pitt. L. Rev. 393 (1992) 20, 21

Peter J. Henning, *Testing the Limits of Investigating and Prosecuting White Collar Crime: How Far Will the Courts Allow Prosecutors to Go?*, 54 U. Pitt. L. Rev. 405 (1993) 16

Pamela S. Karlan, *Discrete and Relational Criminal Representation: The Changing Vision of the Right to Counsel*, 105 Harv. L. Rev. 670 (1992) 16

Jim McGee, "War on Crime Expands U.S. Prosecutors' Powers" (pt. 1), *Wash. Post*, Jan. 10, 1993 21

David S. Rudolf and Thomas K. Maher, "Behind Closed Doors," *The Champion*, May 1990 21

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

KURT HENRY VAN ENGEL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Kurt Henry Van Engel respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-13a) is not yet reported. The opinion of the district court (App., *infra*, 14a-61a) is reported at 809 F. Supp. 1360.

JURISDICTION

The court of appeals entered its judgment on December 20, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

(a) United States Constitution, Amendment V.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

(b) United States Constitution, Amendment VI.

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have a compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT

This petition arises out of the government's pretrial appeal of the dismissal of some charges in a federal criminal case. Kurt Van Engel moved the district court to dismiss the indictment against him because of prosecutorial misconduct. The district court found that the government's misconduct—commencing and pursuing an unfounded investigation of Van Engel's lawyer—so severely prejudiced Van Engel that dismissal of some charges was an appropriately tailored remedy. The court dismissed 13 of 31 counts remaining against Van Engel, exercising original jurisdiction over this criminal case under 18 U.S.C. § 3231. The government immediately appealed the dismissal under 18 U.S.C. § 3731. The court of appeals, fully adopting the district court's factual determinations, agreed that Van Engel's lawyer's conduct was beyond reproach and that the government abused its power in the two-year investigation of the lawyer. But the appeals court reversed the dismissal of charges, finding the government's misconduct to be beyond effective judicial review.

The factual background in this case is complex but undisputed.

A. The Investigation of Van Engel's Lawyer.

Attorney Stephen E. Kravit began representing Van Engel in May 1987 when Gerald Baake and Anthony Zingale—two of three owners of Palmisano & Baake, Inc. ("P&B"), a produce brokerage—filed separate civil RICO lawsuits against Van Engel. Baake and Zingale claimed to be secret partners in Van Engel's produce business, the Kurt Van Engel Commission Company ("KVEC"), and alleged that Van Engel had swindled them out of

their share. They alleged as RICO predicate offenses insurance fraud, the skimming of company funds by checks made out to a fictitious payee, and other misconduct.

Baake's lawyer reported his client's RICO allegations to assistant U.S. attorney Eric Klumb, and then told Kravit he had talked to Klumb. While in the Milwaukee office on another matter Kravit, himself a former assistant U.S. attorney, asked Klumb whether Van Engel was the subject of government investigation. Klumb said the office was not interested in Van Engel's business dispute and that no criminal investigation was pending or likely. The exchange occurred on August 17, 1987.

The next month, Kravit negotiated the settlement of Baake's claims for Van Engel. Under the confidential settlement agreement, Van Engel paid Baake $450,000 for Baake's one-third ownership in P&B. Baake agreed not to compete in the produce business and to turn over to Van Engel or Kravit all the evidence on which Baake's suit had been based. Baake also agreed to notify Van Engel or Kravit if government agents contacted him about his lawsuit, but the agreement expressly provided that he was not constrained from speaking to the government. The evidence, which included tape recordings, was turned over to Kravit; Kravit turned the tape recordings over to Van Engel. Baake retained copies of the tapes, in apparent violation of the settlement agreement. Several months later, Kravit attempted to settle Zingale's claims by the purchase of Zingale's P&B shares—the controlling third—for $1.5 million.

The appeals court underscored that Kravit's conduct was beyond reproach. "Kravit could not have been guilty of obstruction of justice *even if he had destroyed the tapes*

on the spot rather than turning them over to Van Engel" (App., *infra*, 3a) (emphasis added). The district court also found that Kravit's actions were appropriate and ethical in all respects, adopting the opinions of ethics experts who opined that Kravit's actions were actually required by his ethical obligations to Van Engel (App., *infra*, 37a).

In November 1987, an attorney for a grocery chain, Schultz Sav-O Stores, Inc. ("Schultz"), reported to the Milwaukee U.S. attorney's office that Van Engel had bribed its purchasing agent to buy Van Engel's produce. The ensuing criminal investigation was supervised by assistant U.S. attorney Paul Kanter. Schultz's purchasing agent became a cooperating witness for the government, surreptitiously recording conversations over the telephone and in person with Van Engel in December 1987.

At about this time, Kanter discovered the earlier complaint to Klumb about Van Engel. Soon after, Kanter received copies of the settlement agreement with Baake and the offer made to Zingale. Kanter was disturbed by the provision requiring Baake to turn over his evidence to Van Engel, not realizing that this is a common provision in a civil RICO settlement. His concerns were exacerbated when Baake told several government investigators (although only one recorded the statement in a report [App., *infra*, 32a]) that Kravit had told him he wanted the tapes so that they could be destroyed.

Baake was to become the government's operative in a sting investigation against Attorney Kravit. On May 13, 1988, government agents executed search warrants at Van Engel's place of business and that of his accountant. The same day, with government agents recording, Baake

telephoned Kravit to "report" under the settlement agreement about communication with government agents concerning the civil suit. Baake told Kravit he had received a grand jury subpoena (it was actually a pretextual subpoena) and Kravit responded by suggesting that he hire a lawyer. Kravit said nothing remotely improper in the conversation. Continuing through July 1988, Baake initiated more recorded telephone calls and meetings with Kravit, none of which revealed evidence that Kravit was or had been obstructing justice, bribing potential witnesses or otherwise acting improperly.

The secret Kravit investigation kept the affidavit supporting the May search warrants in the Van Engel investigation under seal until December 1988, at Kanter's repeated request (App., *infra*, 20a). Also in December 1988, the government issued grand jury subpoenas to both Kravit and Van Engel, directing them to produce all evidence that had been furnished pursuant to the Baake settlement agreement as well as the checks made out to the supposed fictitious payee. The materials produced included the original checks and the litigation file received from Baake, but no tapes.

Starting immediately after the May 1988 search, Kanter professed to discuss with Kravit topics pertinent to the criminal charges against Van Engel, even though Kravit and Van Engel did not know that Kravit was under investigation. Kravit personally had 48 interactions with the government in this time period.[1] In fact,

---

[1] Kravit's investigator had 27 additional contacts with the government, and one of the firm's other lawyers had 8 (R.159:71).

the government did not consider these conversations serious or substantive because of the Kravit investigation.

In June 1989, Kravit settled another civil lawsuit for Van Engel, this one brought by Schultz (the allegedly defrauded grocery chain) shortly after the search warrants were executed in May 1988. Schultz paid Van Engel $850,000 for a strategically located piece of property that Schultz had mistakenly over-valued at $2.1 million. The government looked at the propriety of this settlement, too (R.161:4).

In early summer 1989, more than a year after the investigation of Kravit began, Kravit was finally informed—not by the government but by the lawyer for a witness—that he was the target of a criminal investigation. This disclosure forced Van Engel to retain separate counsel. After more delay (the appeals court called it "dithering") by the government (including the recusal of the entire Milwaukee office because of Kravit's former employment there), the Kravit investigation was finally closed in May 1990. After 24 months, the investigation had revealed no evidence of any criminal misconduct by Kravit.

Van Engel's indictment was returned on January 3, 1991. Over the next two years, the district court ruled on a variety of motions, dismissing 52 mail and wire fraud counts that were barred by the statute of limitations and 6 Travel Act counts that failed to allege necessary elements (R.138). The government voluntarily dismissed time-barred charges against two other defendants. It withdrew two forfeiture claims under 18 U.S.C. § 982 against Van Engel after his motion to dismiss showed

violation of the *ex post facto* clause of Article I of the U.S. Constitution (R.75).

For three days in August and September 1991, the magistrate judge conducted evidentiary hearings on several Van Engel motions, including prosecutorial misconduct (R.116-18, 127). More than a year later, on October 28 and 29, 1992, the district court held an evidentiary hearing on the prosecutorial and grand jury misconduct motions. Assistant U.S. attorney Paul Kanter testified under oath as a witness, while Kravit and assistant U.S. attorney Eric Klumb made factual proffers (R.159, R.160). After the final hearings and briefing, the district court reviewed the grand jury proceedings *in camera* (R.164).

B. The Rulings Below.

On December 21, 1992, the district court found that the government's investigation and pursuit of Van Engel's attorney was patently improper. The district court found it especially unsettling that the government continued to pursue Kravit well after the available evidence exonerated him. According to the court, any investigation of an attorney representing a defendant under investigation "has the potential for playing havoc with the constitutional right to be represented by a lawyer" (App., *infra*, 31a). It concluded that Van Engel's right to counsel under the Sixth Amendment was damaged by the government's investigation of Kravit, and that this prejudice permeated the pre- and post- indictment phases and would impact on the trial. Van Engel was prejudiced because he was represented by a lawyer the government did not respect or believe, especially at

a time when early disposition might have been available to him. The district court found that Van Engel stands to lose Kravit as his lawyer because of the government's actions and that Van Engel has been hurt by substantial additional delay and expense, both before and after indictment, due solely to the investigation of Kravit. The district court dismissed 13 counts as an appropriately tailored remedy for the misconduct.

The government appealed the dismissal.[2] The appeals court agreed that the government's investigation of Kravit was completely unfounded and totally inept—an example of the "problems of quality control" resulting from the "increase in the number of federal prosecutors in recent years" (App., *infra*, 1a). The court found that grounds for the investigation were meager at best:

> Baake's allegation . . . provided no basis for suspicion that Kravit had been trying to bribe Baake (and even less basis for suspicion that he had engaged in obstruction of justice); nor did the size of the settlement offers, considered in isolation from the merits of Baake's and Zingale's claims against Van Engel, which the prosecutors did not investigate in any depth.

(App., *infra*, 7a-8a.) The court concluded that the Milwaukee office's decision to launch a sting operation against Kravit and to allow it to drag on for two years when it produced no evidence was a questionable employment of the federal government's power.

---

[2] Van Engel also filed a cross-appeal not in issue here, seeking to dismiss the entire indictment as a remedy for the misconduct. The appeals court found it lacked jurisdiction over the cross-appeal.

After finding that an abuse of power occurred, the appeals court nevertheless concluded that no remedy was available. It rejected the district court's analysis of prejudice. According to the appeals court, the delay did not violate due process and any pre-indictment interference with counsel did not constitute prejudice because Sixth Amendment protections are conferred only after the commencement of adversary judicial proceedings. The court reasoned that the pre-indictment investigation of Kravit had Sixth Amendment implications only if it affected Kravit's representation of Van Engel after indictment, but ignored the possibility of prejudice here because Kravit was exonerated and the investigation ended before Van Engel's indictment. The appeals court questioned whether a court may *ever* interfere with a criminal investigation conducted in good faith, even one conceded by the government to have been inept.

The appeals court also strongly criticized the district court's remedy as "particularly arbitrary" (App., *infra*, 13a). After presiding over the case for two years, ruling on numerous motions, considering testimonial evidence and reviewing the grand jury proceedings, the district court chose to strike certain counts from the indictment. The appeals court, however, doubted whether the district court knew enough about the government's case to tailor a remedy.

REASONS FOR GRANTING THE WRIT

It is true that the "Department of Justice wields enormous power over people's lives" (App., *infra*, 7a). There is no better example than this case. A well-respected lawyer was investigated solely as a result of the government's wrongheaded view of his actions in settling civil cases, and this investigation dragged on for two years with much of the delay due not to necessity but to government "dithering." The investigation of the client was dragged out along with it, including a year-long period where the client did not know of his lawyer's disability and where the lawyer was being strung along by everyone in the government who dealt with him or his office. The fallout of the government's bumbling was a major intrusion into the client's relationship with his lawyer, infringement of the effectiveness of his lawyer, and enormous additional expense and delay.

The appeals court reached the conclusion that what federal prosecutors do in investigation is invariably beyond the reach of the federal courts. But this abdication of control conflicts in principle with decisions of this Court concerning due process and the right to counsel. The government's ability—with impunity—to conduct a lengthy, unfounded investigation of a target's lawyer runs counter to society's expectations of fairness and endangers the vitality of the adversary process.

Today there is growing fear of the abusive tactics of prosecutors, including increasing intrusions into lawyer-client relationships, and the failure of the courts to curb unconstitutional excesses. Serious government misconduct of several varieties has been surfacing with alarming frequency. The district courts, who are nearer to

these problems, have begun to react by dismissing indictments. But courts of appeal have reinstated them even while not condoning the conduct. Direction from this Court is urgently needed.

I. The Decision of the Court of Appeals is Erroneous.

The Court has never approved of a prosecutor commencing and pursuing an unfounded investigation against a client's lawyer in secret, where neither the client nor the lawyer knows of the lawyer's disability. The Court has never approved of an unfounded investigation of a lawyer causing a two-year pre-indictment detour for the client, as well as two more years (and counting) of post-indictment delay and cost. Yet the appeals court erroneously found that none of this mattered: the prejudice found by the district court was not prejudice in the constitutional sense, according to the appeals court, and the client had no remedy for the damage caused.

Decisions of this Court have established that unjustified delay and expense suffered by a putative criminal defendant do not pass Constitutional muster and require judicial intervention. The appeals court's decision is erroneously premised on a finding that expense and delay are simply uncompensable burdens that citizens must bear when they have the ill fortune of being accused of a crime. The court's sole source for this holding is *Cobbledick v. United States*, 309 U.S. 323, 325 (1940), where this Court observed: "Bearing the discomfiture and cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship." But *Cobbledick* is not a case about signifi-

cant increased expense and delay imposed on an accused because of the reckless, or even negligent, government investigation of his lawyer. *Cobbledick* holds that the denial of a motion to quash a grand jury subpoena *duces tecum* is not a final order permitting pretrial appeal. The Court's expression of this burden of citizenship was intended to explain why no pretrial appeal would be allowed; the Court did not negate the protections the Fifth and Sixth Amendments afford.

This Court has recognized that prejudice from unjustified, inordinate delays and expenses violates constitutional norms under both the Fifth and Sixth Amendments. In *United States v. MacDonald*, 456 U.S. 1, 7 (1982), and *United States v. Marion*, 404 U.S. 307, 320 (1971), the Court accepted that unconstitutional delay after arrest impairs an accused's ability to present an effective defense, seriously interferes with his liberty, disrupts employment, drains financial resources, curtails associations, holds him up to public obloquy and causes serious personal distress. In *United States v. Lovasco*, 431 U.S. 783, 791 (1977), the Court acknowledged that these costs "are by no means insubstantial" during investigation and prior to arrest, as well as after arrest. *See also Klopfer v. North Carolina*, 386 U.S. 213, 222 (1967) (deprivation of employment recognized under the Sixth Amendment's speedy trial clause). Rule 2 of the Federal Rules of Criminal Procedure even instructs courts to interpret the federal rules to "eliminat[e] . . . unjustifiable expense and delay."

The appeals court here agreed with the district court that the delay in this case was not due to justifiable investigation but due to an unfounded and inept investigation of a lawyer that had nothing to do with the gov-

ernment's case against the client.[3] The premise of *Lovasco* is that investigative delay is tolerable only when it is undertaken for the proper purpose of satisfying the prosecutor that he has built his case and should issue charges. Delay utilized by the prosecution to investigate its case "is fundamentally unlike delay undertaken by the government solely 'to gain tactical advantage over the accused.' " *Lovasco*, 431 U.S. at 795, *quoting United States v. Marion*, 404 U.S. at 324. The delay in this case was not a delay undertaken for the proper investigative purpose of exploring the evidence against Van Engel. It was due to an unfounded and inept pursuit of his lawyer.

This Court's decisions also accept and protect the relationship between putative criminal defendants and their lawyers, even before indictment, even when the Constitution does not compel the appointment of counsel. The appeals court is of the mistaken view that a prosecutor's interference with counsel prior to indictment is not remediable because the Sixth Amendment's right to counsel attaches only at indictment. The conclusion does not follow from prevailing precedents. This Court has long protected the private relationship between clients and lawyers as a component of due process. *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932), recognizes that the right to be heard through counsel is an essential component of due process. In *Chandler v. Fretag*, 348 U.S. 3, 9 (1954), the Court held that by denying the petitioner an opportunity to obtain counsel on a criminal accusation,

---

[3] Although not so in the opinion of the prosecutor. At the misconduct hearing, he testified that it was his intent to link Van Engel's lawyer to his client and charge him with "an overarching RICO conspiracy" (R.160:295).

the trial court deprived him of due process: "Regardless of whether petitioner would have been entitled to the appointment of counsel, his right to be heard *through his own counsel* was unqualified." *Id.* at 9 (footnote omitted) (emphasis added). *Accord*, *In re Groban*, 352 U.S. 330, 332 (1957). The Court's decisions concerning interrogation accept that the Fifth Amendment provides a basis for a suspect's right "to deal with the police only through counsel." *Edwards v. Arizona*, 451 U.S. 477, 484 (1981); *McNeil v. Wisconsin*, 111 S. Ct. 2204, 2209 (1991).[4] In this case, Van Engel never had the opportunity to be heard through counsel because the government had secretly targeted his counsel in an undisclosed investigation.

Protecting a putative criminal defendant's relationship with counsel from gross governmental intrusion only after indictment is untenable. It would turn the investigative stage of complex criminal cases into a free-for-all, with the government using unchecked power to investi-

---

[4] The appeals court here has even previously recognized a clear Fifth Amendment right to be heard through counsel, in the context of a grand jury witness:

> The witness's right is akin to that of parties in civil cases—a right under the due process clause to be free of unjustified interference by the government in a private arrangement between client and lawyer.

In re Schmidt, 775 F.2d 822, 824 (7th Cir. 1985). *Accord*, *United States v. Ramsey*, 785 F.2d 184, 193 (7th Cir.), *cert. denied*, 476 U.S. 1186 (1986); *In re Taylor*, 567 F.2d 1183, 1186 n. 1 (2d Cir. 1977) ("obstruct[ing the] ability to enter private contractual arrangements for representation would deprive him of his constitutional right to due process of law").

gate lawyers at will.[5] Conditioning protection of the relationship with counsel on the return of an indictment abdicates too much power to government prosecutors, who can then manipulate the client's rights by controlling when the client's indictment occurs. *United States v. Hammad*, 858 F.2d 834, 839 (2d Cir. 1988). The reality is that in complex white collar cases today, counsel are of necessity entering the process at ever earlier stages, well before indictment. Peter J. Henning, *Testing the Limits of Investigating and Prosecuting White Collar Crime: How Far Will the Courts Allow Prosecutors to Go?*, 54 U. Pitt. L. Rev. 405, 409 (1993); Pamela S. Karlan, *Discrete and Relational Criminal Representation: The Changing Vision of the Right to Counsel*, 105 Harv. L. Rev. 670, 671 (1992). The protection of the attorney-client privilege has never been defined by the stage of the proceedings. *Upjohn v. United States*, 449 U.S. 383, 389 (1981). Nor does the cloak of the joint defense privilege depend upon the issuance of charges. *In re Grand Jury Subpoenas*, 902 F.2d 244, 249 (4th Cir. 1990) ("whether an action is ongoing or contemplated, whether the jointly interested persons are defendants or plaintiffs, and whether the litigation or potential litigation is civil or criminal, the rationale for the joint defense rule remains unchanged . . ."); *Continental Oil Co. v. United States*, 330 F.2d 347, 350 (9th Cir. 1964).

---

[5] The district court was "surprised to learn . . . that the decision on whether or not to launch an investigation of this sort is pretty much up to the judgment of the assistant United States attorney handling the case. No formal rules, procedures, or guidelines are in place to govern such an investigation. . . . I find the lack of standards, procedures, and guidelines to be shocking" (App., *infra*, 31a).

The decisions of this Court do not establish that a good faith criminal investigation of a lawyer can never invade the Sixth Amendment rights of a client. Prosecutorial discretion is not "unfettered." *Wayte v. United States*, 470 U.S. 598, 608 (1985). The appeals court cited *Weatherford v. Bursey*, 429 U.S. 545 (1977), as the basis for its conclusion that the government's actions here were beyond the reach of judicial remedy. But *Weatherford* will not bear the weight the appeals court placed on it. To the contrary, *Weatherford* holds that a deliberate government invasion of the "defense camp" is unacceptable under the Sixth Amendment. *Id.* at 554 & n. 4. *Weatherford* makes it clear that interference with defense strategy that creates a "realistic possibility of injury to [defendant] *or benefit to the State*" is forbidden. *Id.* at 545 (emphasis added). In this case, of course, neither the district court nor the court of appeals found that the government acted in good faith.

Finally, the appeals court's conclusion that dismissal of selected counts was "particularly arbitrary" conflicts in principle with *United States v. Morrison*, 449 U.S. 361 (1981). In *Morrison*, this Court held that the remedy for Sixth Amendment violations must be tailored specifically to cure the prejudice. *Id.* at 365-66 n. 2. But the appeals court's decision rejects the conclusion that a district court can *ever* be in a position to tailor a remedy. The district court had presided over the case for two years following indictment, ruled on dozens of motions, considered testimonial evidence taken over five days, and had even reviewed the entire grand jury proceedings. If this district court was not in a position to tailor a remedy to the prejudice it found, it is inconceivable that any court ever would be.

An adversary system under which the Constitution provides no protection against the abusive tactics of prosecutors who invade and manipulate lawyer-client relationships is unacceptable. The appeals court did not disagree with the district court's factual assessment of the government's conduct; in fact, the appeals court adopted it wholesale. In rejecting the district court's finding of prejudice, the appeals court essentially concluded that prejudice will never result from such governmental intrusion. The appeals court's analysis conflicts in principle with decisions of this Court and is unsupportable. It creates open season on defense lawyers, tramples the rights of clients not accused of crimes, and endangers the balance of fairness in the adversary system.

II. The Question Presented is Important.

If not now, when will the Court address grave concerns about misuse of unbridled prosecutorial authority to interfere with counsel for a person under investigation?

Writing for himself and Justices Blackmun, O'Connor and Thomas, in his dissent in *United States v. Williams*, 112 S. Ct. 1735 (1992), Justice Stevens warns of unchecked prosecutorial misconduct:

> Unlike the Court, I am unwilling to hold that countless forms of prosecutorial misconduct must be tolerated—no matter how prejudicial they may be, or how seriously they may distort the legitimate function of the grand jury—simply because they are not proscribed by Rule 6 of the Federal Rules of Criminal Procedure or a statute that is applicable in grand jury proceedings. Such a sharp break with the

> traditional rule of the federal judiciary is unprecedented, unwarranted and unwise. Unrestrained prosecutorial misconduct in grand jury proceedings is inconsistent with the administration of justice in the federal courts and should be redressed in appropriate cases by the dismissal of indictments obtained by improper methods.

Id. at 1753 (footnote omitted). The same rationale applies to prosecutorial misconduct found outside of the grand jury process, like that in issue here. The federal courts must redress misconduct in appropriate cases in order to protect and maintain the vitality of the adversary system.

Courts, commentators and the public are increasingly concerned today with the effect on the adversary process of unchecked prosecutorial misconduct. District courts have dismissed indictments because of distress over governmental abuses, while some appellate courts have been reluctant to allow the dismissals to stand. *United States v. Burnside*, 824 F. Supp. 1215 (N.D. Ill. 1993) (convictions overturned because of government misconduct in failing to disclose exculpatory evidence); *United States v. Andrews*, 824 F. Supp. 1273 (N.D. Ill. 1993) (same); *United States v. Boyd*, 833 F. Supp. 1277 (N.D. Ill. 1993) (same); *United States v. Marshank*, 777 F. Supp. 1507 (N.D. Cal. 1991) (indictment dismissed because the government interfered with an attorney-client relationship by using defense counsel as a government agent to trap the client); *United States v. Lopez*, 765 F. Supp. 1433 (N.D. Cal. 1991) (indictment dismissed because of the prosecutor's violation of court rules prohibiting contacts with subjects known to be represented by counsel), *rev'd*, 989 F.2d 1032 (9th Cir. 1993) (no prejudice found);

United States v. Omni International Corp., 634 F. Supp. 1414 (D. Md. 1986) (indictment dismissed because of alteration and creation of documents by the government, false testimony of government witnesses and government's lack of candor); *United States v. Caputo*, 633 F. Supp. 1479 (E.D. Pa. 1986) (indictment dismissed because of government's use of sham subpoena), *rev'd*, 825 F.2d 754 (4th Cir. 1987); *United States v. Pardue*, 765 F. Supp. 513 (W.D. Ark. 1991) (acquittal granted because of outrageous government misconduct in inducing the offense), *rev'd*, 983 F.2d 835, 843 (8th Cir.), *cert. denied*, 113 S. Ct. 3043 (1993); *United States v. Isgro*, 751 F. Supp. 846 (C.D. Cal. 1990) (indictment dismissed because of government's concealment from the grand jury of prior sworn testimony of its main witness that was diametrically opposed to the witness's grand jury testimony), *rev'd*, 974 F.2d 1091 (9th Cir. 1992). The perceived problems of abuses of power by government prosecutors are varied, widespread and regrettably frequent.

Legal commentators have chronicled an increasing deference to prosecutorial discretion in every form that has stimulated a law enforcement mentality that the "end justifies the means." Bennett L. Gershman, *The New Prosecutors*, 53 U. Pitt. L. Rev. 393, 394 (1992). According to Professor Gershman, attack on criminal defense lawyers is "an even more ominous threat to the advocacy system":

> This new strategy to "kill attorneys" appears to be the result of a new prosecutorial ethos that views the criminal defense bar as no more than an obstruction to legitimate government investigations. . . . [P]rosecutors have been given the power to select or reject their own adversaries, and thereby

> refashion, and to some extent even control, the course of private criminal defense representation. . . .

Id. at 401, 403, 404. Federal prosecutors' recent emphasis on white collar crime "presents prosecutors with new temptations to make the examination of attorneys an integral part of their investigations." David J. Fried, *Too High a Price for Truth: The Exception to the Attorney-Client Privilege for Contemplated Crimes and Fraud*, 64 N.C.L. Rev. 443, 473 (1986). The attacks on lawyers come in a variety of circumstances. For example, recent statistical evidence establishes that federal prosecutors issue subpoenas to defense attorneys at the rate of 645 per year. David S. Rudolf and Thomas K. Maher, "Behind Closed Doors," *The Champion*, May 1990, at 15, 18.

The public media has also raised the same fears of unfair use of government authority in investigation:

> . . . Justice Department policies and Supreme Court rulings have given prosecutors more flexibility than ever before in pursuing convictions, and made it increasingly difficult for courts or aggrieved individuals to hold federal prosecutors accountable for tactics that once were considered grounds for case dismissal or disciplinary action. [These] tactics include manipulation of grand juries; failure to disclose evidence favorable to a suspect or defendant; government intrusion into the relationship between defense attorneys and clients; intimidation of witnesses; and blitzkrieg indictments or threats of indictment designed to force capitulation without the need for a trial.

Jim McGee, "War on Crime Expands U.S. Prosecutors' Powers" (pt. 1), *Wash. Post*, Jan. 10, 1993, at A1.

The problem of the abuse by government prosecutors of their authority as illustrated in this case is an important and growing one. As the Court of Appeals for the Seventh Circuit put it: "The increase in the number of federal prosecutors in recent years has brought in its train problems of quality control" (App., *infra*, 1a). The Court should clarify for the lower courts the contours of acceptable investigative conduct under the Constitution's protections of due process and the right to counsel, and their power to dismiss indictments as a consequence of government misconduct.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

STEPHEN E. KRAVIT
Counsel of Record
JANICE A. RHODES
KRAVIT, GASS & WEBER, S.C.
825 North Jefferson
Milwaukee, Wisconsin 53202
(414) 271-7100
Counsel for Petitioner

March 1994

APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 93-1184, 93-1255

UNITED STATES OF AMERICA,

Plaintiff-Appellant/Cross-Appellee,

v.

KURT HENRY VAN ENGEL,

Defendant-Appellee/Cross-Appellant.

Appeals from the United States District Court
for the Eastern District of Wisconsin.
No. 91 CR 5—**Terence T. Evans,** *Chief Judge.*

ARGUED NOVEMBER 3, 1993—DECIDED DECEMBER 20, 1993

Before POSNER, *Chief Judge,* COFFEY, *Circuit Judge,* and ZAGEL, *District Judge.**

POSNER, *Chief Judge.* The increase in the number of federal prosecutors in recent years has brought in its train problems of quality control. These problems led the district judge in this case to dismiss a number of counts of a fraud indictment, 809 F. Supp. 1360 (E.D. Wis. 1992), precipitating this appeal by the government under 18 U.S.C. § 3731 and a cross-appeal by the defendant asking us to throw out the entire indictment.

---

* Hon. James B. Zagel of the Northern District of Illinois, sitting by designation.

Kurt Van Engel, the defendant, a wholesale distributor of produce, fell out with his partners, Baake and Zingale. They brought civil RICO suits against him alleging as predicate offenses insurance fraud, the skimming of company funds by checks made out to a fictitious payee, and other criminal misconduct. Van Engel was represented in these suits by a former assistant U.S. attorney in the Milwaukee office of the Department of Justice, Stephen Kravit. Baake's lawyer reported the allegations in the RICO suits to an assistant U.S. attorney named Eric Klumb and told Kravit that he had done so. While visiting the Milwaukee office in connection with another matter, Kravit asked Klumb, with whom Kravit had an acquaintance dating from his days in the Milwaukee office, about the likelihood of a criminal investigation of Van Engel. Klumb told him that the office was not interested in Van Engel's squabble with his business partners and that no criminal investigation was pending or likely. Kravit came away with the impression that a criminal investigation of his client was highly unlikely. This conversation took place in August 1987. The following month Kravit negotiated on Van Engel's behalf a settlement of Baake's suit. The terms of the settlement included an agreement by Baake to turn over to Van Engel or Kravit all the evidence, including tape recordings, on which Baake's suit had been based. The evidence was turned over to Kravit, who turned the tape recordings over to Van Engel, who may have destroyed them. Baake retained copies, in violation of the settlement agreement. Kravit made a similar though (as we shall see) seemingly much more generous settlement offer to Zingale on behalf of Van Engel, but Zingale rejected it.

In November 1987, the Milwaukee U.S. Attorney's office received a complaint from a grocery chain that Van Engel had bribed its purchasing agent to buy produce exclusively from him. A criminal investigation was launched under the supervision of assistant U.S. attorney Paul Kanter. The bribed purchasing agent was "turned," and recorded a phone conversation with Van Engel in which the latter

offered him $200,000 for his silence. At about this time Kanter discovered the earlier complaint about Van Engel, the one Klumb had received. Shortly afterward Kanter received, apparently from Baake's and Zingale's lawyers, copies of the settlement agreement with Baake and the offer to Zingale. Kanter was disturbed by the provision requiring the turning over of evidence to the defendant, not realizing that this is a common provision in a civil RICO settlement. His concerns were exacerbated when Baake told one of the government investigators that Kravit had told him that he wanted the tapes so that they could be destroyed.

Kanter, perhaps because of lack of guidance from seasoned prosecutors, began to suspect that Kravit might have committed a crime. What crime? Since at the time of the turnover of the tapes to Kravit Van Engel had not even been the subject of a criminal investigation, let alone of a judicial proceeding—certainly none known to Kravit—Kravit could not have been guilty of obstruction of justice even if he had destroyed the tapes on the spot rather than turning them over to Van Engel. The federal obstruction of justice statute, 18 U.S.C. § 1503, is limited to obstruction of a judicial proceeding, and there was no such proceeding either when Kravit received the tapes or when he turned them over to Van Engel. *United States v. Neal*, 951 F.2d 630, 632 (5th Cir. 1992); *United States v. Vesich*, 724 F.2d 451, 454 (5th Cir. 1984). In special circumstances an obstruction of a judicial proceeding might occur time-bomb fashion before the proceeding had begun. In *United States v. Lallemand*, 989 F.2d 936, 938-39 (7th Cir. 1993), we gave the example of a blackmailer who before even committing the crime instructs an accomplice to kill his victim and any other witnesses should the victim report the blackmail attempt. Nothing of the kind is suggested here. Even Van Engel has not been charged with obstruction of justice arising out of the disappearance of the tapes.

Kravit might conceivably have been guilty of violating 18 U.S.C. § 1510(a), which makes it a crime to bribe some-

one to "obstruct, delay, or prevent the communication of information relating to a violation of any criminal statute of the United States . . . to a criminal investigator." Part of the money paid in settlement of Baake's suit was presumably for the turnover of the tapes and other documents, and if the object was to "prevent the communication of [the information contained in them] . . . to a criminal investigator," Kravit, if he shared and tried to further the object, might be thought to have aided and abetted a violation of the statute by his client. Some support for this theory might be found in the fact that the settlement offer which Kravit made to Zingale on Van Engel's behalf was for $1.5 million, even though Baake had settled for only $450,000. It is unclear, however, whether the statute is applicable if there is no criminal investigation known to be in progress. *United States v. Daly*, 842 F.2d 1380, 1390-91 (2d Cir. 1988); and compare *United States v. Leisure*, 844 F.2d 1347, 1364 (8th Cir. 1988), with *United States v. Carzoli*, 447 F.2d 774, 779 (7th Cir. 1971). It is also unclear whether either the settlement with Baake or the offer to Zingale was excessive in relation to a fair estimate of the expected value of their legal claims, which may not have been identical; whether, when the offers to Baake and Zingale were made, Van Engel or Kravit anticipated that Van Engel was likely to be prosecuted; whether Kravit had an improper purpose in negotiating for what as we have said is a common term in a civil RICO settlement agreement; and whether Kanter or others in the Milwaukee office of the Justice Department had thought through the question of Kravit's potential criminal liability for his role in the settlement negotiations.

Whatever doubts Kanter should have had about such liability, he nevertheless launched a sting operation against attorney Kravit. The first step was to pretend to serve Baake with a grand jury subpoena. Since the settlement agreement required Baake to report to Van Engel or his lawyers any communication with law-enforcement authorities concerning the civil suit (the agreement expressly authorized Baake to make such communications—it was

not intended to silence him), the "subpoena" gave Baake a pretext to call Kravit. In the phone conversation, which took place on May 13, 1988, and was recorded at the government's direction, Baake told Kravit that he had received a grand jury subpoena and Kravit responded by suggesting that he hire a lawyer. Kravit said nothing remotely improper in the conversation. Bakke made further recorded phone calls to Kravit, none of which turned up evidence that Kravit was or had been obstructing justice, bribing potential witnesses, or otherwise acting improperly. Nevertheless in November 1988 a grand jury subpoena—a real one—was issued to Kravit, directing him to produce all evidence that had been furnished to him pursuant to the settlement agreement with Baake. He produced documents, but no tapes.

In the summer of 1989, with the investigations of both Van Engel and Kravit continuing, Kravit was informed—not by the government but by the lawyer for a witness—that he was the target of a criminal investigation. Until then he had been representing Van Engel in the criminal investigation of the latter. As soon as he discovered that he himself was under investigation, he withdrew and Van Engel retained substitute counsel. After more dithering by the government (including the recusal of the entire Milwaukee office because of Kravit's former employment there), the investigation was finally closed in May 1990, having obtained in two years no evidence of any criminal misconduct. Kravit resumed representing Van Engel, who was finally indicted.

The indictment contained 89 counts. Many of these either were barred by the statute of limitations or were based on criminal statutes that had been enacted after Van Engel's alleged crimes, which stretched back to the early 1970s. The judge dismissed a total of 56 counts on these and other grounds, and the government does not appeal from any of these dismissals. The remaining 33 counts charged Van Engel with having violated the mail fraud statute by defrauding an insurance company and grocery stores, obstructed justice, violated the RICO statute, and com-

mitted tax fraud. The obstruction of justice count is based on Van Engel's attempt to bribe the grocery chain's purchasing agent to remain silent.

The judge dismissed the 12 counts involving RICO and tax fraud as a sanction for what he regarded as the government's interference with Van Engel's Sixth Amendment right to counsel through the protracted criminal investigation of attorney Kravit. He picked the RICO count because it was the most costly and time-consuming to defend and the tax counts because the government could recoup its tax losses in civil proceedings against Van Engel. While critical of the government's conduct with regard to the grand jury that had indicted Van Engel (there were a series of questionable acts, including unauthorized disclosure of matters before the grand jury, but we need not prolong this opinion with a recital of them), he declined to dismiss the entire indictment as a sanction, precipitating the cross-appeal.

We can dispose of the cross-appeal quickly. We have no jurisdiction. Interlocutory appeals are even more disfavored in the criminal than in the civil arena, *United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 265 (1982) (per curiam); *Flanagan v. United States*, 465 U.S. 259, 264-66 (1984), because of what is believed to be an overriding interest in prompt disposition of criminal cases. Compare, for example, the ten-day limit on taking a criminal appeal with the thirty-day and sixty-day limits in ordinary civil cases. Fed. R. App. P. 4. The only reason the government is allowed to appeal from the dismissal of fewer than all counts of an indictment is that it cannot appeal from any acquittal that might result from the truncation of the indictment, an acquittal that by operation of double jeopardy might preclude a retrial of the dismissed counts even if the dismissal were reversed on appeal. This ground for an interlocutory criminal appeal is exceptional, and is obviously not applicable to the cross-appeal in this case. Because interlocutory criminal appeals are extremely rare, the application of the doctrine of pendent appellate jurisdiction in criminal cases, the only possible jurisdictional basis for the cross-appeal, is correspond-

ingly rare although not completely unknown. *United States v. Zafiro*, 945 F.2d 881, 885 (7th Cir. 1991), aff'd, 113 S. Ct. 933 (1993). We certainly have no basis for thinking that it should be given a more generous scope in the criminal than in the civil setting, and we must insist therefore at a minimum that the main and pendent claims display a very large degree of overlap so that the pendent claim is unlikely to slow down the case by making the appeal more complicated. That condition is not fulfilled here. The main appeal concerns alleged infringement by the government of Van Engel's right to counsel; the pendent appeal concerns alleged infringement of his right to a grand jury. The facts and legal principles bearing on the infringements are different. So we shall confine our consideration of the merits to the main appeal.

The Department of Justice wields enormous power over people's lives, much of it beyond effective judicial or political review. With power comes responsibility, moral if not legal, for its prudent and restrained exercise; and responsibility implies knowledge, experience, and sound judgment, not just good faith. Someone in the Milwaukee U.S. Attorney's office should have known that the turnover provision in the Baake settlement was not a red flag of criminal behavior by the lawyer who had negotiated it on the defendant's behalf and that even Baake's allegation that Kravit wanted the tapes so that they could be destroyed was not in itself an allegation of criminal misconduct. (If it were, lawyers and their clients could never throw away a scrap of paper.) The record is not entirely clear on whether Baake's allegation related to a time when Kravit would have known that a criminal investigation of Van Engel was under way or imminent. But it seems that Baake was merely explaining (or conjecturing) why the turnover provision had been included in the settlement agreement in the first place, an agreement made before Kravit had reason to believe that Van Engel would be the subject of a criminal investigation. Baake's allegation thus provided no basis for suspicion that Kravit had been trying to bribe Baake (and even less basis for suspicion that he had engaged in obstruction of justice); nor did the

size of the settlement offers, considered in isolation from the merits of Baake's and Zingale's claims against Van Engel, which the prosecutors did not investigate in any depth.

On meager grounds the U.S. Attorney's office launched a sting operation against the lawyer for an individual under criminal investigation by the same office. Although the operation produced zero evidence or leads to evidence of illegal conduct, it dragged on for two years. A questionable employment of the federal government's power, to say the least—but did it violate any rights of Van Engel? The judge thought it undermined Kravit's effectiveness in negotiating with the government on Van Engel's behalf during the investigatory stage of the proceedings against Van Engel, delayed the indictment, imposed additional expense on Van Engel, and may undermine Kravit's representation of him at trial by requiring Kravit to testify as a witness to the obstruction of justice charge. In the judge's mind these things added up to a violation of the Sixth Amendment, though he did not dismiss the obstruction charge.

Consider first the delay in indicting Van Engel. His alleged crimes span a period from the early 1970s to 1987, and, given the government's heavy burden of proof in a criminal case, delay usually works to the defendant's advantage. This is in general, not in every case; sometimes, preindictment delay can so work to the defendant's disadvantage as to be deemed to deny him due process. *United States v. Lovasco*, 431 U.S. 783 (1977). But only when there is a tangible showing of prejudice, such as the loss of a vital defense witness. *United States v. Marion*, 404 U.S. 307, 325 (1971); *United States v. Loud Hawk*, 474 U.S. 302, 315 (1986); *United States v. Anagnostou*, 974 F.2d 939, 941-42 (7th Cir. 1992). The fact that the defense was "somewhat prejudiced" will not do. *United States v. Lovasco, supra*, 431 U.S. at 796; *Wilson v. McCaughtry*, 994 F.2d 1228, 1233 (7th Cir. 1993); *United States v. Nichols*, 937 F.2d 1257, 1261 (7th Cir. 1991). Even concrete prejudice may not be enough; as suggested in *Wilson* and even more emphatically in *Anagnostou*, see 994 F.2d at 1233,

with support in the Supreme Court's decisions in *Lovasco* and *United States v. Gouveia*, 467 U.S. 180, 192 (1984), the defendant may have to show that the government's delay was deliberate, that it was trying to wrest a tactical advantage by delay. And the anxiety of uncertainty is not an acceptable substitute for a concrete showing of prejudice, *United States v. Anagnostou*, *supra*, 974 F.2d at 942 n. 1, let alone for deliberate governmental misconduct. Nor is added expense. *Cobbledick v. United States*, 309 U.S. 323, 325 (1940).

In any event *Lovasco* and the cases following it are due process cases, and the district judge based his ruling on the Sixth Amendment's right to counsel. Even when preindictment delay makes it more difficult for a defendant to mount an effective defense, it does not deny him the effective assistance of counsel. Anyway there is no evidence that the preindictment delay in this case will impede Van Engel's defense at trial in the least.

It is possible that if Kravit had not been under investigation, the prosecutors would have been more forthcoming in negotiating with him a plea bargain for Van Engel that the latter would prefer to the uncertainties of trial; and it is possible also that after the dust finally settled and Kravit was cleared, the chance for favorable plea negotiations had been lost, because the government had invested a lot in the investigation, reducing the incremental cost of pushing on to a trial, and maybe because Van Engel had lost the chance to drive a good bargain by turning someone else in. Both points are speculative, however, and only the first bears on the right to counsel at all. *United States v. McLain*, 823 F.2d 1457, 1464 (11th Cir. 1987). An attempt to build a Sixth Amendment violation on them is doomed in any event because the right to counsel which that amendment confers does not attach until adversary judicial proceedings (indictment, arraignment, information, or preliminary hearing) have begun. *McNeil v. Wisconsin*, 111 S. Ct. 2204 (1991); *United States v. Gouveia*, *supra*, 467 U.S. at 188-90. Plea bargaining often does, and here did, occur before then. It is true that one can't tell from

the opinion in *United States v. McLain*, *supra*, whether the plea bargaining that the investigation of the defendant's lawyer was alleged to have interfered with occurred before or after indictment; but no inference can be drawn that the court would have deemed this question immaterial had it been raised.

The preindictment investigation of Kravit could violate the Sixth Amendment, therefore, only if it affected his representation of Van Engel at the later stages of the case, in particular the trial. But how could it have done so? It is true that Kravit is a potential witness on the obstruction of justice charge; he may be asked to testify whether he ever gave Van Engel reason to believe that the latter was under investigation when he bribed the purchasing agent. But the possibility that Kravit might be called to testify on that subject has nothing to do with the investigation of his role in negotiating with Van Engel's partners. There is no basis for concern that *that* investigation will turn out to have prevented Van Engel from being represented at trial by the counsel of his choice—namely Kravit—or that it will undermine Kravit's effectiveness in that role. *Wheat v. United States*, 486 U.S. 153, 159 (1988); *United States v. Lowry*, 971 F.2d 55, 59 (7th Cir. 1992). Previous cases in which the investigation of a lawyer has been claimed to violate the client's right to counsel have involved investigations that were going on while the client was being tried. See, e.g., *Thompkins v. Cohen*, 965 F.2d 330, 332 (7th Cir. 1992); *United States v. Balzano*, 916 F.2d 1273, 1293 (7th Cir. 1990); *United States v. Greig*, 967 F.2d 1018, 1022-23 (5th Cir. 1992); *Government of the Virgin Islands v. Zepp*, 748 F.2d 125, 136 (3d Cir. 1984); *United States v. Cancilla*, 725 F.2d 867, 869-71 (2d Cir. 1984). In no previous appellate case has an investigation of a defendant's lawyer that ended before the trial began been held to interfere with the client's Sixth Amendment rights, let alone an investigation that exonerated the lawyer.

Even if the criminal investigation of Kravit had invaded an interest that the Sixth Amendment protects, there would be a question whether a criminal investigation of a

lawyer that is conducted in good faith can ever invade the Sixth Amendment rights of the lawyer's clients. *Weatherford v. Bursey*, 429 U.S. 545, 558 (1977), hints that the answer is "no," but the question has never received sustained judicial attention; the previous cases have focused, as have we, on whether the investigation made the lawyer's representation of his client ineffective. The decision to conduct a criminal investigation is not subject to judicial review unless invidious criteria such as race or religion infect the decision, *Wayte v. United States*, 470 U.S. 598, 608 (1985); *Oyler v. Boles*, 368 U.S. 448, 456 (1962); *United States v. Giannattasio*, 979 F.2d 98, 100 (7th Cir. 1992); and lawyers enjoy no immunity from the nation's criminal laws. Judges should be reluctant to deter criminal investigations of lawyers by holding over the government's head the threat of dismissing suits against the target's clients should the investigation fizzle. The government in this case virtually concedes the ineptitude of its investigation of Kravit. But in the usual case judges do not have reliable criteria for assessing the care with which a criminal investigation is conducted, and should therefore hesitate to entertain complaints by criminal defendants that their lawyers were investigated unnecessarily. Deliberate harassment is different (though we can find no cases), but is not claimed here.

Since there was no violation of Van Engel's rights, there was no basis for imposing a sanction tantamount to a partial acquittal. A federal judge is not authorized to punish the misconduct of a prosecutor by letting the defendant walk, unless the misconduct not only violated the defendant's rights but also prejudiced his defense, and neither condition is satisfied here. *United States v. Morrison*, 449 U.S. 361, 365 (1981); *United States v. Payner*, 447 U.S. 727, 739 n. 9 (1980). The fact that the judge in this case dismissed fewer than all the counts in the indictment does not affect the principle: a defendant is not entitled to be given an advantage at trial by way of remedy against government misconduct that did not infringe his rights. It is word play to reply that a criminal defendant has a "right"

not to be subjected to outrageous government conduct. A few cases (though none in this circuit, as we noted in *United States v. Olson*, 978 F.2d 1472, 1481 (7th Cir. 1992)), building on dicta in *United States v. Russell*, 411 U.S. 423, 431-32 (1973), have required the acquittal, on grounds of outrageous government misconduct, of criminal defendants who could not quite fit themselves within the contours of the defense of entrapment. These cases do not speak any recognizable language of rights; they emphasize the unseemliness, inefficiency, and danger to innocent third parties of sting operations in which the government creates an elaborate criminal enterprise the better to ensnare persons disposed to criminal activity. *United States v. Luttrell*, 889 F.2d 806, 811-13 (9th Cir. 1989); *United States v. Twigg*, 588 F.2d 373, 380-82 (3d Cir. 1978). These cases, criticized in *United States v. Santana*, 6 F.3d 1, 3-4 (1st Cir. 1993), and *United States v. Miller*, 891 F.2d 1265, 1271-73 (7th Cir. 1989) (concurring opinion), are not easily reconciled with the Supreme Court's decisions cited above that postdate *Russell* and hold that a federal judge cannot punish the prosecutor at the expense of the law-abiding public. The defense of entrapment is based on the idea that the legislature in enacting criminal law does not intend the government to turn people into criminals. The basis of the defense of "outrageous prosecutorial misconduct" has never been satisfactorily articulated but seems an extension of the idea behind exclusionary rules, that the only effective way of deterring prosecutorial misconduct is to make the conviction of the guilty more difficult. Such rules are no longer much in vogue in federal jurisprudence. See, e.g., *United States v. Leon*, 468 U.S. 897 (1984). The entrapment defense stands on firmer footing, being intended for the protection of people who would be innocent if the government had not furnished an overpowering inducement or an essential opportunity.

It is almost superfluous to add that a remedy which consists of striking counts from an indictment bears very little relation to the wrong. *United States v. Morrison*, *supra*, 449 U.S. at 365-66. The selection of the tax counts

to drop was particularly arbitrary. And after 12 counts were dropped, 21 remained. We do not know—and we doubt that the district judge knows—enough about the government's charging and trial strategy to estimate the magnitude of the sanction that he imposed and compare it to the wrong allegedly done Van Engel: which was not, however—and this is our essential point—a legal wrong.

The judge's approach had the further defect of prematurity. The time to assess an alleged interference with the right to counsel is after the trial. If Van Engel is acquitted, the issue will be moot, since the added delay and expense that he incurred are not sources of legal entitlement; they are burdens of citizenship that Congress has not chosen to alleviate by compensating acquitted persons. If he is convicted, it will be time enough to assess the effect if any which the investigation of Kravit had on his ability to defend Van Engel effectively. Although determining that effect would no doubt be difficult, predicting the effect is hopeless.

The judgment is reversed, and the cross-appeal dismissed for want of jurisdiction.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

[Filed December 21, 1992]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Case No. 91-Cr-5

UNITED STATES OF AMERICA,

Plaintiff,

v.

KURT HENRY VAN ENGEL, LYLE VAN ENGEL, BERNARD K. VAN ENGEL, JOSEPH L. PALMISANO, BARBARA A. SCHWELLINGER, HOWARD F. SCHAEFER, EUGENE E. KNOLL, LARRY J. PITZEN, and JAMES A. WALKER,

Defendants.

DECISION and ORDER

The final pretrial issue in this case is an unappetizing one; Kurt Van Engel's motion to dismiss the indictment based on a claim that the government engaged in prosecutorial misconduct and that it abused the grand jury process. The issue has been briefed, and a hearing was conducted on the matter at the end of October. After the hearing I urged the parties to meet and try to resolve the issue. I have been advised that efforts to reach an agreement were unsuccessful. My decision on the motion follows.

Mr. Van Engel asserts seven grounds in support of his motion to dismiss:

(1) the government prosecutor lied to the magistrate judge in order to keep a search warrant affidavit sealed between May and December 1988;

(2) government agents violated the secrecy provisions of rule 6(e);

(3) the prosecutor abused the grand jury subpoena power;

(4) the government presented an overabundance of hearsay;

(5) exculpatory evidence was kept from the grand jury;

(6) the grand jurors could not have understood the indictment; and

(7) the government pursued an unwarranted theory of the case that interfered with Mr. Van Engel's relationship with his lawyer, Stephen E. Kravit.

Issues three through six fall under the general claim of grand jury abuse. Issues one and two are hybrids; part grand jury abuse and part government misconduct. I will, in no particular order, address the first six issues and then go to the most troubling issue, number seven.

I will resist the temptation to get bogged down in a lengthy recitation of the facts giving rise to the various issues raised on this final motion to dismiss. The facts have been spelled out in other decisions, both by me and by the magistrate judge. They will not be repeated here. I will only comment on the facts if I believe that comment is necessary for a full understanding of the context within which I decide the issues.

Issue two relates to what I'll call the *Milwaukee Magazine* interviews. The lead agents involved in the investigation of Mr. Van Engel, Richard Arkenberg of the IRS and Peter Linder of the FBI, consented to be interviewed

by James Romenesko of *Milwaukee Magazine* in early 1989, while the grand jury investigation was under way. It was not a good idea. In May 1989, *Milwaukee Magazine* ran a lengthy lead article entitled "The Battle of Commission Row" by Mr. Romenesko. It contained extensive, but unattributed, quotations that I find came from Agents Arkenberg and Linder. The article recounted, among other things, the allegations in various civil suits (the Baake, Zingale, and Schultz litigation), statements in the search warrant affidavit, details of the execution of the search at the Van Engel company May 13, 1988, and gratuitous opinions and observations about the investigation of Mr. Van Engel. In his article, Mr. Romenesko ascribed much of his information and some of his quoted matter to "federal investigators" or "federal officials." Those agents were Arkenberg and Linder.

Federal government agents do not ordinarily talk to reporters about pending investigations. Agent Linder was reluctant to talk to Mr. Romenesko, but he was instructed to do so by his superior, Larry Nelson, the former agent in charge of this district's office of the FBI. Agent Arkenberg testified that in his 17 years as an IRS agent he had never given a statement other than "no comment" to the press about a pending case. The decision by the agents to talk to Mr. Romenesko was unusual.

Rule 6(e) states:

> A grand juror, an interpreter, a stenographer and operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3) (A) (i) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation may be imposed on any person except in

accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court.

In a hearing before Magistrate Judge Bittner, Agents Arkenberg and Linder maintained that they talked with Mr. Romenesko only about information contained in the search warrant affidavit that had recently been made public. As I read it, the overwhelming percentage of information appearing in the *Milwaukee Magazine* story comes directly from the search warrant affidavit. Once information or evidence involved in a grand jury investigation properly becomes part of the public record, as it does when a search warrant affidavit is unsealed, it loses its character as grand jury material. Although it was unwise, the agents did not violate rule 6 by talking with Mr. Romenesko about the contents of the warrant.

But, the agents' claim that they confined their discussion with the reporter only to matters disclosed in the search warrant affidavit is not credible. Agent Linder admitted to the possibility that he told Mr. Romenesko that "[t]his is the first time the FBI has looked into the produce business here." Agent Linder also admitted that he could have said "[w]e're all getting screwed on this." Agent Arkenberg, the affidavit's author, admitted saying that Mr. Van Engel "doesn't show his money at all." Both Agents Linder and Arkenberg discussed various "Oost" checks (claimed to be phony) with Mr. Romenesko, but maintained that they discussed only the Oost checks described in the affidavit and specifically did not discuss the Oost checks they had received from Mr. Van Engel's lawyers pursuant to a grand jury subpoena. Both agents said they might have made the statement that general knowledge in the banking industry is that company checks should not be cashed. These topics are beyond the contents of the search warrant. To the extent that they strayed—

and they strayed a tad—from the four corners of the affidavit, they violated rule 6. But I am not convinced that the violation is the kind of knowing violation of the rule that would make sanctions appropriate.

Sanctions aside, the real problem with the highly unusual decision of the agents to speak with Mr. Romenesko about a pending investigation is that it adds fuel to Mr. Van Engel's argument that the government engaged in an orchestrated effort to try him in the press and ruin him personally, long before the return of the indictment. The agents let it be known that Mr. Van Engel was a bad guy who had done wrong. Comments like "We're all getting screwed on this" certainly convey the impression that the federal "investigators" or "officials" are convinced of Van Engel's guilt. These kinds of comments, to a reporter who is obviously going to use them in a story, should not be made. Agents should, absent a compelling need that is not present here, let indictments do their talking. They should not, as agents of the government, give interviews and express opinions like those given here while a case or an investigation is pending. Had the *Milwaukee Magazine* article found its way into the grand jury room—which would not have been impossible—a resulting indictment would be suspect.

I now turn to issues one, three, four, and five. On these points, Mr. Van Engel complains about prosecution "lies" submitted to the magistrate judge, an alleged abuse of the grand jury's subpoena power, a "flagrantly excessive" parade of hearsay before the jury, and a failure, by the prosecutor, to present evidence to the grand jury that cast doubt on Mr. Van Engel's alleged criminality. These issues have at least one thing in common: not much merit.

Mr. Van Engel argues that the government abused the grand jury's subpoena power by subpoenaing individuals

for the purpose of interviewing them instead of presenting them personally to the grand jury as witnesses. It appears that about 20 noncustodial witnesses received grand jury subpoenas during the time this matter was pending before a succession of three grand juries. Almost all of them gave statements to the government agents in lieu of testifying. Most of these witnesses were represented by counsel. The procedure followed seems to have been done with the knowledge and consent of the attorneys for the witnesses. Four witnesses who were not represented by counsel and who did not personally testify were from Florida, North Carolina, Texas, and Arizona.

The government, I believe, did not interview witnesses for any reason other than efficiency of the grand jury and the convenience of the witnesses and their attorneys. Most importantly, I find that Mr. Van Engel was not prejudiced by the procedure, and the grand jury was not misled or denied witnesses' testimony.

This leads to the next concern: the use, or rather the alleged "flagrantly excessive" use of hearsay in the grand jury room. Five witnesses (other than custodial witnesses) testified before the grand jury. Three agents of the government—Linder, Arkenberg, and Mike Kohl of the Department of Labor—testified before the indicting grand jury. Two minor witnesses testified before the first grand jury. Arguing that because no "transactional" witnesses were called to testify, Mr. Van Engel says that the indictment is based on an excessive amount of hearsay.

Mr. Van Engel, citing *United States v. Flomenhoft*, 714 F.2d 708, 712 (7th Cir. 1983), *cert. denied*, 465 U.S. 1068 (1984), argues that the "excessive use of hearsay evidence in a grand jury proceeding violates an accused's Fifth Amendment rights." That's not exactly what *Flomenhoft*

says. Rather, it notes the long-settled law that hearsay is not only admissible before a grand jury, but that "an indictment based solely on hearsay evidence is valid." *Flomenhoft* only helps the defense when it goes on to note that the "excessive use of hearsay evidence in a grand jury proceeding *may* violate" a defendant's rights. 714 F.2d 712 (emphasis added). So one must look for an egregious situation before too much hearsay spoils an indictment. *Flomenhoft* was not such a case, and neither is this one. The claim that the prosecutor here somehow browbeat or intimidated the grand jury into refusing to pursue the attendance of witnesses is unpersuasive.

Mr. Van Engel also argues that exculpatory evidence was not presented to the grand jury. Most of the air has been taken out of this issue by the Supreme Court's recent decision in *United States v. Williams*, ___ U.S. ___, 112 S. Ct. 1735, 118 L.Ed.2d 352 (1992). In a nutshell, *Williams* held that a district court may not dismiss an otherwise valid indictment because the government failed to disclose to a grand jury "substantial exculpatory evidence in its possession." *Williams* controls this issue, which must be resolved against Mr. Van Engel.

Lastly on this series of issues is Mr. Van Engel's claim that lies were offered by the prosecutor to the magistrate judge. The government filed three motions with the magistrate judge seeking orders to continue the sealed status of the search warrant affidavit. Mr. Van Engel contends that the prosecutor "made false and misleading statements" in these motions in an effort to secure an order keeping the search warrant affidavit under wraps. The magistrate judge granted the extension—although for shorter periods than requested—and the search warrant affidavit remained sealed until December of 1988, 8 months after the search was conducted.

I do not find that lies were submitted by the prosecutor to the magistrate judge to secure extensions of the sealing orders. I also do not believe that the government had an obligation, during the period in question (post-search warrant execution through the last sealing motion), to tell the magistrate judge that the government was investigating Mr. Van Engel's attorney. As conceded by the government at the October hearing, the third sealing motion did contain an inaccurate paragraph that, consistent with the deletion of another paragraph, should no longer have been in the motion. But, I believe that this was a mistake, not an intentional falsehood. When one reviews the whole record, including the sealed exhibit D, which describes a serious incident involving Mr. Van Engel, one cannot help but conclude that there's not enough heat on the issue to start a fire. This issue is resolved against Mr. Van Engel.

That's all that needs to be said about issues one, three, four, and five. Although I have found no merit to Mr. Van Engel's complaints on these four issues, that should not be interpreted as a signal by me that I think the government did everything correctly. It did not. The comments of AUSA Paul Kanter to the grand jury that he did not want to "parade before you 200 people" could be viewed as a veiled attempt to discourage the grand jury from insisting on hearing the testimony of live witnesses. I don't subscribe evil motives to the statement, but it was not a good way for him to address the situation. Also, Mr. Kanter was, on occasion, too cavalier with the grand jury. For example, he commenced a discussion with the grand jury about the law by saying:

> Federal law, in order to be a federal crime and to have a crime prosecuted in federal court as opposed to state court, there has to be what is kind of a

> stupid word, but you know lawyers; they have to come up with stupid words to make themselves look important. And since Congress, of course, is made of primarily lawyers, all our laws are written stupidly, and no one can understand them but lawyers, and that keeps lawyers employed.

Comments like these are not what one expects from an experienced government attorney. Lastly, at least the third, and possibly the second, request to the magistrate judge for extensions of the sealing order do not appear to have been fully justified. The fact that I am willing to give the benefit of the doubt on this point to the government does not mean that I do so without reservations. I move now to issue six, Mr. Van Engel's claim that the grand jurors could not have understood the indictment before it was signed and returned.

The ultimate product of a grand jury is an indictment. The 82-page indictment returned by the grand jury in this case named 10 defendants and covered 95 counts.[1] It contained allegations of three different conspiracies and schemes to defraud.

The indictment handed up by the grand jury was presented to it for consideration on January 3, 1991. The government has stipulated that it was read to the indicting grand jury on January 3 prior to the grand jury being asked to consider it. All exhibits, subpoenaed material, and transcripts of testimony heard by other grand juries

---

[1] Ironically, attorney Kravit is no stranger to multicount monster indictments. As an assistant United States attorney in this district in the 1970's, he got a grand jury to return an indictment against the Jos. Schlitz Brewing Company that contained 652 more counts than appear in the indictment returned in this case.

that considered the case were left with the indicting grand jury during its deliberations on January 3.

I do not know how long it took the prosecutor to read the 82-page proposed indictment to the grand jurors. But I suspect that even Evelyn Wood would have needed a few hours. And, considering its complexity, it is difficult to fathom how the grand jurors could have fully understood its contents. So I have concerns about what happened here. To put those concerns in context, a brief review of the grand jury as an institution is appropriate.

The grand jury plays a unique roll in the federal criminal process. But just what that role is is not altogether clear. Flowery Supreme Court decisions describe the grand jury as a bulwark of freedom; an independent group of citizens that stands between the all-powerful government and the powerless citizen. The purpose of the grand jury is "to provide a fair method of instituting criminal proceedings . . . ." *Costello v. United States*, 350 U.S. 359, 362, 76 S. Ct. 406, 408, 100 L.Ed. 397 (1956). Its "mission is to clear the innocent, no less than to bring to trial those who may be guilty." *United States v. Dionisio*, 410 U.S. 1, 16-17, 93 S. Ct. 764, 772-773, 35 L.Ed.2d 67 (1973). The grand jury is "a protector of citizens against arbitrary and oppressive governmental action." *United States v. Calandra*, 414 U.S. 338, 343, 94 S. Ct. 613, 617, 38 L.Ed. 2d 561 (1974). It is often said, therefore, that a grand jury must be both "independent" and "informed." *Wood v. Georgia*, 370 U.S. 375, 390, 82 S. Ct. 1364, 1373, 8 L.Ed.2d 569 (1962). As Chief Justice Warren noted in *Wood*:

> Historically, this body has been regarded as a primary security to the innocent against hasty, malicious and oppressive persecution; it serves the invaluable function in our society of standing between the accuser and the accused, whether the latter be an individual,

> minority group, or other, to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will . . . . The necessity to society of an independent and informed grand jury becomes readily apparent . . . .

People who are intimately involved with the day-to-day operations of grand juries often scoff at the kind of lofty descriptions announced by Chief Justice Warren in *Wood*. It is the view of many that grand juries today are nothing more than tools of the prosecution. As the late William J. Campbell, a distinguished former chief district court judge from Chicago, noted:

> Today, the grand jury is the total captive of the prosecutor who, if he is candid, will concede that he can indict anybody, at any time, for almost anything, before any grand jury.

Judge William J. Campbell, *Eliminate the Grand Jury*, 64 Journal of Criminal Law and Criminology 174 (1973). What happened in this case shows, I believe, that Judge Campbell was on to something when he spoke of the grand jury as a sword rather than a shield.

Given what occurred in this case, one certainly has to question the quality and the quantity of consideration given to the proposed indictment before the jurors knocked on the door to say their deliberations were finished. The process that was followed casts doubt on whether the grand jury performed as a protective bulwark between the government and the ten indictees in this case.

But unfortunately for Mr. Van Engel, that doubt is not a sufficient basis for dismissing the indictment. Despite my misgivings about the process in general and the procedure used in this case in particular, the law does not make dismissal of the indictment on the basis of this claim a reasonable option.

An indictment returned by a legally constituted grand jury is presumed to be valid on its face. Similarly, there is a strong presumption of regularity that attaches to all grand jury proceedings. A defendant seeking to challenge this presumption has a difficult burden. *See Costello, infra*; *United States v. Lisinski*, 728 F.2d 887, 893 (7th Cir.), *cert. denied*, 469 U.S. 832 (1984); *United States v. Baltesto*, 646 F.2d 237, 242 (6th Cir.), *cert. denied*, 454 U.S. 1046 (1981).

Mr. Van Engel relies on *United States v. Carcaise*, 442 F. Supp. 1209 (M.D. Fla. 1978), a district court decision dismissing an indictment because a grand jury did not have sufficient time to give it proper consideration. The court in *Carcaise* concluded that the grand jury could not have "read and understood the 1,160 pages of deposition testimony in a session of 6 hours and 45 minutes, a part of which was occupied by other matters." 442 F. Supp. at 1213. A similar conclusion is not justified in this case.

Unlike *Carcaise*, the grand jury in this case was not asked to review 1,160 pages of transcripts of prior testimony, hear the testimony of 12 witnesses, and deliberate on the proposed indictment in less than 7 hours. The indicting grand jury here met four times, hearing live (albeit mostly hearsay) testimony on three of the occasions. Prior testimony, with one minor exception, was read to the grand jury. The indictment was read to the grand jury in its entirety and left for its review, along with all other evidence, during its deliberations. The grand jury was free to consider the matter for as long as it wished.

True, the grand jury acted rather quickly in this case. But a quick indictment, like a quick verdict returned by a petit jury, can be just as indicative of a strong case as it can be of juror indifference or confusion. For this

reason alone, it is unwise to look with suspicion at an indictment or a verdict returned after a short period of deliberation.

Carcaise, where the indictment was dismissed without prejudice so the matter could be reconsidered by another grand jury, was an extraordinary case. This case is merely unusual. Given the law as it exists, I decline to find fault with the grand jury's deliberations in this case.

So I leave the issues regarding the grand jury with an overall view that the process, although singed a bit, was not burned. The violation of rule 6 was a misdemeanor. The shortcomings I noted were unfortunate. But to dismiss the indictment based on these claims would be wrong. I turn now to the last issue.

On the previous issues I was content to not fully lay out the facts because they were set forth in other decisions. On the final issue, I think it best that the facts as I see them be stated.

In May of 1987, Gerald Baake and Anthony Zingale, alleged part owners in Kurt Van Engel's produce business, filed separate civil RICO lawsuits in federal court alleging the same facts: Kurt Van Engel skimmed money from his own company by issuing phony checks made out to "Jake Oost"; Van Engel submitted an inflated insurance claim to Aetna Casualty & Surety Company, claiming he lost produce he never had when an explosion during the construction of Milwaukee's deep tunnel project rocked his company; and, generally, Van Engel swindled both Baake and Zingale out of their rightful shares in Van Engel's business. Mr. Van Engel hired attorney Stephen E. Kravit to represent him in the defense of the two civil RICO cases. Mr. Kravit filed motions to dismiss the complaints on July 7, 1987.

Mr. Kravit's motions to dismiss apparently were good ones because Baake and Zingale voluntarily dismissed their complaints under Fed. R. Civ. P. 41 on August 14, 1987. At some point, Baake's lawyer, Clifford Steele, told Mr. Kravit that he had conveyed Baake's allegations to the government—specifically to Assistant United States Attorney Eric Klumb. Kravit and Klumb knew each other. Klumb worked for Kravit as a law clerk when Kravit was an assistant U.S. attorney and, when Klumb became a lawyer, he worked at Kravit's former firm, Godfrey & Kahn, for 8 months. While in the United States Attorney's office on another matter on August 17, 1987,[2] Kravit talked with Klumb about the Baake matter. AUSA Klumb told Kravit that the government had not opened a case regarding Mr. Van Engel and had not assigned an agent to investigate the allegations in the civil RICO suits. Mr. Kravit ended his conversation with Klumb with the understanding that there was no government investigation pending or presently contemplated.

In the early fall of 1987, through their lawyers, both Baake and Zingale threatened to re-file the civil RICO complaints that had been dismissed. During September, Mr. Kravit negotiated with Baake's lawyers for the settlement of Baake's potential claim. A settlement agreement, finalized on October 7, 1987, called for the payment to Baake of $450,000 in exchange for his shares (one-third ownership) in Palmisano & Baake, Inc. Among other provisions, Baake agreed not to compete in the produce business in consideration for $1,500 paid monthly for 2 years. Baake agreed to give Mr. Van Engel his lawyer's litiga-

---

[2] Kravit's records show that this conversation occurred on August 17. Klumb, understandably, has no record of the date as it was just a conversation in passing between two friends.

tion files and certain tape recordings he had made of conversations with Mr. Van Engel. Baake also agreed to notify Mr. Van Engel or Mr. Kravit if government agents or others contacted him about the matters described in his previous lawsuit. The agreement, labeled as "confidential," did not constrain Baake from speaking to the government nor dictate what Baake could say:

> This contractual obligation to inform Van Engel or his attorney of such contacts should not be construed in any way as prohibiting Baake from receiving such contacts or as telling Baake what he may say pursuant to such contacts.

A similar settlement agreement was being negotiated with Mr. Zingale.

In late November 1987, Timothy Girdaukas, a produce buyer for Schultz Sav-0 stores in Sheboygan, lost his job, allegedly because he had been bribed by Mr. Van Engel. Schultz's lawyer contacted the United States Attorney's office with the information. A short time later, Mr. Girdaukas began to cooperate with the government by recording conversations over the telephone and in person with Kurt Van Engel in December 1987. These conversations became the basis for count 78 of the indictment, obstruction of justice.

In January 1988, grand jury consideration of the case commenced under the primary direction of AUSA Paul Kanter. Mr. Baake was interviewed by government agents Arkenberg and Linder on March 23, 1988. According to Arkenberg's memorandum (but, strangely, not Linder's), Baake claimed that, during the discussions of the settlement of Baake's civil RICO case, Mr. Kravit "advised" Baake that he "wanted all of the documents and tape recordings Baake had made in respect to Van Engel so they could be destroyed." Baake's statement to the agents, and

the Baake-Zingale-Van Engel settlement papers, prompted the prosecutors to widen the probe of Mr. Van Engel to include an investigation into the conduct of attorney Kravit.

Some time prior to May 13, 1988, agent Arkenberg prepared an affidavit (the same one that was kept sealed at Mr. Kanter's request until December of 1988) to support an application for a warrant to search the buildings where Mr. Van Engel did business. The warrant was executed on May 13, 1988. After the search started, Mr. Van Engel, or someone at his request, called Mr. Kravit at his office to tell him that the warrant was being executed. Soon after the call, Kravit arrived to observe the search.

During the search, Mr. Kravit objected to the seizure of various items that he said were protected by the attorney-client privilege. When he complained, an agent escorted him out of the room being searched and tried to force him to leave the premises, claiming he was obstructing the search. AUSA Kanter was contacted by phone about the situation, and he told the agent that Kravit could remain on the premises. Kravit was appropriately told, however, that the seizure of the documents would continue without interference. Not unexpectedly, documents that Kravit claimed were privileged were seized. I later agreed with Mr. Kravit that certain materials seized from Mr. Van Engel's office were "quite possibly subject to attorney-client privilege" and that a determination would have to be made at a later point if the government attempted to use them in evidence at trial (decision of February 6, 1992, at 31). Thousands of documents were ultimately seized and carted away from Mr. Van Engel's business after the search.

Later on the same day of the search, at the government's behest, Mr. Baake telephoned Mr. Kravit at his office, ostensibly to report a government contact pursuant to the civil settlement agreement. The call was taped. Baake told Kravit that he had received a subpoena to testify about Mr. Van Engel before the grand jury. During the conversation, at Mr. Kanter's or the agents' request, Baake clearly attempted to get Kravit to obstruct Baake's testimony. Kravit did nothing of the sort. He simply asked Baake for the "matter" number of the subpoena, and he told Baake he should contact a lawyer.

After the May 13 telephone conversation, and continuing through July of 1988, at the government's request, Baake initiated other taped telephone calls and meetings with Kravit or his investigator in an attempt to discover or create incriminating statements to ensnarl Kravit in criminal activities.

In the summer of 1989, more than a year after the investigation of him started, Mr. Kravit finally learned that he personally was the subject of a continuing government undercover investigation into his conduct while representing Mr. Van Engel. This information was not conveyed to him by the government, but by a lawyer for attorney Steele, who at the time was Mr. Zingale's lawyer. This caused Van Engel, upon Kravit's advice, to immediately retain separate counsel unassociated with the Kravit firm. Mr. Kravit also retained an attorney. In December 1989, 20 months after it commenced its investigation of Mr. Kravit, the United States Attorney's office for this district recused itself and sent the file to the United States Attorney's office for the Northern District of Illinois. The case was assigned to Assistant United States Attorneys Michael Shepard and Joel Bertocchi.

In May 1990, AUSAs Shepard and Bertocchi closed the investigation of Kravit by declining to prosecute him for criminal misconduct. Oversight of the Van Engel case was then returned to the United States Attorney's office in this district.

I start my analysis of this issue by noting what should be obvious: the decision to formally investigate the conduct of an attorney representing a defendant who is under investigation or under indictment is a serious matter. Such an investigation has the potential for playing havoc with the constitutional right to be represented by a lawyer. I was surprised to learn during the October hearing that the decision on whether or not to launch an investigation of this sort is pretty much up to the judgment of the assistant United States attorney handling the case. No formal rules, procedures, or guidelines are in place to govern such an investigation. Considering the seriousness of and possible consequences attending such a decision and the obvious problems it can cause for the case in general and the attorney involved in particular, I find the lack of standards, procedures, and guidelines to be shocking.

As best I can determine, the government decided to investigate the conduct of Mr. Kravit for two reasons: It had received the statement from Baake that Kravit wanted to "destroy" evidence, and it had a copy of the written settlement agreements in the Baake-Zingale lawsuits which required, as a condition of the settlement, that all "litigation files" (and in the Zingale matter, tape recordings) be turned over to Kravit as Mr. Van Engel's attorney.

I find that, given this state of affairs, the government was justified in coming to the conclusion that it should "look into the matter." Some type of inquiry, probably an informal one, was appropriate. But I do not believe

that the launching of a full scale undercover investigation of attorney Kravit was justified based on what the government knew at the time. What was done in this case far exceeded what should have been necessary to see that no laws were being broken. To put into context why I think that what the government did here was wrong, it is helpful to note what I believe would have been an appropriate governmental response given the information that was available.

Given the fact that the government attorneys in charge of the investigation had no significant experience in the handling of civil RICO lawsuits, it would have been advisable for them to show the written settlement agreements to more experienced attorneys—in or out of their office—and solicit opinions as to whether the agreements contained anything that was illegal. I don't believe that any competent attorney handling civil RICO litigation would have concluded that the turnover provisions of the settlement agreements were inappropriate. At the most, the turnover provisions might have been construed as "aggressive lawyering," but they would not have been found to be illegal. The fact that the prosecutors did not seek advice from anyone with civil RICO expertise is a major flaw in the way the United States Attorney's office handled this investigation.

In addition to the settlement agreement itself, the government had the statement of Baake, given to Agent Arkenberg (as I previously noted, Agent Linder was present at the time but doesn't have a note of the statement in his form 302 report), wherein Baake said that Kravit told him he wanted to get the evidence so that it could be destroyed. Rather than inquire as to whether or not this statement had any reasonable chance of being true, the government apparently accepted it as true, or proba-

bly true, and used it as one of the two cornerstones of its investigation of attorney Kravit. An appropriate inquiry in my view would have been to ascertain the context within which that statement was allegedly made. That inquiry would have disclosed that Kravit did not have conversations with Baake when others, including attorneys for Baake, were not present. That a statement such as this would have been made by an attorney, especially with witnesses to it, is most unlikely.

So I believe the government was justified in making an inquiry, and had it made the kind of inquiry I am suggesting here, the matter would have quickly died. Instead, the government saw criminality where none was present and embarked on an investigation that created a 2-year nightmare for attorney Kravit and a major problem for Mr. Van Engel.

It is true, of course, that no one is above the law, including an attorney. If an attorney commits criminal acts he or she should, of course, be investigated and prosecuted. But it is not unreasonable to expect that good judgment and common sense will be brought to bear on the nature and extent of an investigation of anyone accused of wrongdoing, including an attorney.

The attorney subject to the investigation, Stephen Kravit, is a former assistant United States attorney in this district. He had a distinguished career as a lawyer in that office, and he enjoys a stellar reputation in the Milwaukee legal community. It would not have been inappropriate for the government to take this into account in considering whether or not it was likely that Mr. Kravit had violated the law, as alleged by Mr. Baake and suspected, apparently, by the government when it reviewed the written settlement agreements. If someone came into the United States Attorney's office with an allegation

that Zdenek Macal, Rembert Weakland, and Bud Selig were involved in a conspiracy to import multikilograms of cocaine from Colombia, one would think that their reputations would give pause to a government attorney receiving the tip. Even in this bizarre situation an "inquiry" might be appropriate; the launching of a full-scale undercover investigation would be outrageous.

Instead of conducting the more modest and prudent inquiry I have suggested, the government launched into a sting investigation of Mr. Kravit. Mr. Baake was given a phony subpoena allegedly ordering him to appear before the grand jury and produce documents. Baake, at the government's direction, then called Mr. Kravit at his law office. The call was made after Kravit returned to his office following the search earlier in the day at the Kurt Van Engel company. During the taped conversation Baake was attempting to get Kravit to tell him what to do or what to say in regard to the subpoena. He was trying to get Kravit to obstruct justice. Mr. Kravit didn't even come close to taking the bait and instead made only appropriate inquiries of Mr. Baake. Although I think it was going too far to send Mr. Baake out on this fishing expedition, I think that once it was completed, and no fish was caught, that the "investigation" should have come to an end. But it did not. There were many more surreptitiously taped telephone conversations and face-to-face meetings as Baake continued to pursue Kravit. All during this time, Kravit did not come close to engaging in illegal activity.

One unsettling example of the way the government conducted the Kravit investigation arises from a comparison of the government's transcript to the actual tape of one of the recordings Baake made when acting as the government's undercover agent. In a discussion about Baake

making statements to the government, Mr. Kravit says the following:

> Right. And nobody ever said you shouldn't tell the truth.

But the government's transcript of this taped statement has Mr. Kravit saying:

> Alright, nobody ever said you should go.

If Mr. Kravit said to Baake, "Nobody ever said you should go," a reasonable inference might be that he was suggesting that Baake need not respond to a government subpoena. In fact, of course, Mr. Kravit's real statement permits no such inference. The opposite is true: he told Baake to tell the truth. The government explains the error by saying that the transcription here was just a "draft." But draft or not, more should be expected from the government in a sensitive investigation of this sort.

As shaky as the factual foundation for this investigation and sting operation was, its legal foundation was even weaker. There are no criminal charges that could stem from what the government thought Mr. Kravit did. The Baake settlement provisions could not constitute obstruction of justice as contemplated by 18 U.S.C. § 1510, since the government had no basis for showing the existence of, or Mr. Kravit's knowledge of, a pending investigation. *United States v. Carzoli*, 447 F.2d 774 (7th Cir. 1971), *cert. denied*, 404 U.S. 1015 (1972). The government was aware that AUSA Klumb had told Kravit there was no investigation, and Kravit's obvious good-faith reliance on Klumb's statement would negate the specific intent required by the statute. *United States v. Carleo*, 576 F.2d 846, 849 (10th Cir.), *cert. denied*, 439 U.S. 850 (1978); *see United States v. Machi*, 811 F.2d 991 (7th Cir. 1987); *United States v. McComb*, 744 F.2d 555 (7th Cir. 1984). Mr. Kravit

neither committed any affirmative act, nor failed to perform an act required to be done, sufficient to impose criminal liability under section 1510. Prosecution under a theory of conspiracy to defraud the government, in violation of 18 U.S.C. § 371, would also have been untenable, since the settling of the Baake case was not a fraudulent act and did not compromise the integrity of any governmental investigation. *See Hammerschmidt v. United States*, 265 U.S. 182 (1924); *United States v. Minarik*, 875 F.2d 1186 (6th Cir. 1989). There is no "crime" that could have been based on the facts in the government's possession. Its investigation stemming from Baake's incredible statement was based on legal theories that were nonexistent.

Mr. Kravit's counsel provided Assistant United States Attorneys Shepard and Bertocchi with the written opinions of Notre Dame Law School Professor G. Robert Blakey (the father of the federal RICO statute), Professor Michael McChrystal of Marquette Law School, and Indiana University Law School Dean Norman Lefstein. All are experts on RICO law, obstruction of justice statutes, and/or legal ethics. The three experts discussed the Baake-Zingale-Van Engel settlement agreements in light of RICO, obstruction of justice statutes, and codes of professional attorney responsibility.

Professor Blakey noted in his opinion letter that

> [s]ettlements, not only of RICO claims, but also of anti-trust and securities matters always involve the settlement of issues that raise at least a possibility of a parallel criminal prosecution. Confidentially [sic] agreements, too, are not unique. In fact, they are a common feature of the settlement of civil litigation generally. . . . An effort to use the blunt instrument of the criminal law to second guess good faith civil

> negotiations in the RICO—or any other area—would be, not only unauthorized and unprecedented, but also profoundly unwise.
>
> . . . .
>
> A prosecution on this set of facts of this individual would be a travesty of justice.

In concluding that attorney Kravit violated no ethical provisions of the code of professional responsibility, Professor McChrystal noted:

> If lawyers were bound to evaluate all material they receive as to whether it could constitute evidence of a crime and so had to be revealed or produced, the principle of confidentiality would be lost. The mere potential that materials received by the lawyer could be evidence of a crime is far too loose a standard upon which to impose a duty to reveal or produce the material, and no reasonable construction of the Code would support such a standard.

Dean Lefstein said:

> It is my opinion that Mr. Kravit's conduct in negotiating and in preparing the agreement was not improper and does not subject him to charges of professional impropriety under either Wisconsin rules or the American Bar Association Standards for Criminal Justice Relating to The Defense Function.

The full opinion letter reports of Blakey, McChrystal, and Lefstein are attached to this decision and incorporated herein. Read together, their opinions say that Mr. Kravit not only did nothing wrong in his handling of the Baake-Zingale civil RICO settlements, but that he was doing what his duty required in negotiating the terms of the agreements including the requirement that litigation files and tapes be turned over. Had the government prosecutors, as I suggested, run the settlement agreements past someone with more experience early on, they would have

been told the same thing. But caution was not exercised by the government. Flying blind, the ill-fated undercover investigation of attorney Kravit was launched. It was to last for over 2 years.

During the hearing on this matter in October, Mr. Kravit, I believe, hit the nail on the head when he said the government really approached its investigation of him as it would approach the investigation of a drug case. There is a big difference, however, between the two. In fraud litigation, both civil and criminal, what happens can be interpreted in different ways because there is no contraband, like a kilo of cocaine, that taints everyone who touches it. In fraud litigation you have to look for duties, and you have to look for shades of gray as to how the duties might have been exercised. I do not think that was done here by the government. The government, it seems to me, looked at this situation and thought that everything about it was probably criminal.

The government seems to view the civil fraud lawyer today as almost a policeman or agent of the government. The government seems to suggest that, when a lawyer handling a civil case comes upon a situation that has lots of different potentialities, the lawyer must first and foremost be thinking about how it is he or she should report the activity to the government. The lawyer should be thinking about how the evidence is to be preserved so that the government can find it later on in its investigation. That is not what the law requires. Telling on this point, which underscores the view that the government approached this case like a drug investigation, was its attorney's argument during the October hearing that it had a right to investigate Kravit just as it investigated and uncovered wrongdoing in the case of attorney Marc Polland.

Mr. Polland was an attorney who was successfully prosecuted recently for distributing cocaine, which he obtained from a client. There are no gray areas regarding cocaine. That kind of a situation is cut and dry. A lot more consideration, sifting, and winnowing of responsibilities, duties, and obligations in the gray area of civil and criminal fraud is necessary to make a case. This was a distinction that, it seems to me, was given far too little attention by the government.

From start to finish, the investigation of Mr. Kravit lasted more than 2 years. The length of the "investigation" boggles the mind. Mr. Kravit has been wronged by this activity. One can only imagine the anxious moments and sleepless nights he endured by unnecessarily being the subject of a federal criminal undercover investigation. The awesome power to inflict that kind of pain on a citizen should have been exercised with greater controls and supervision than occurred here.

While I have no real difficulty reaching the conclusions I have reached regarding the Kravit investigation, those conclusions take me to the next step, which creates a few more problems. If Mr. Van Engel was not harmed by the investigation of Mr. Kravit it would be, in the playground vernacular, no harm no foul. Under the unique facts of this case, however, I find that Mr. Van Engel was prejudiced by the investigation of his attorney. The government's investigation interfered with Mr. Van Engel's relationship with his lawyer. The investigation has forced Mr. Kravit to become a potential defense witness.

Also, while the investigation of Kravit was underway, Mr. Van Engel's right to counsel guaranteed by the sixth amendment was damaged. During the undercover sting operation, Mr. Kravit had 48 contacts with the prosecutors

in this case. Because he was under investigation, the prosecutors, although professing to treat him just like they would any other attorney, refused to have substantive discussions with him about the case.

While Mr. Van Engel certainly did not enjoy any right to have an early disposition of this case through plea negotiations, that was an option that would have ordinarily been available to him but for the investigation of Mr. Kravit. Mr. Kravit did say that he tried to engage in early plea negotiations in this case but that the government refused to consider it. At the time, he didn't know why, and the reason was, of course, the undercover investigation of him. Because the government suspected criminality, it did not give true credibility and respect to Kravit's position as Van Engel's advocate.

Van Engel also had to hire another lawyer at additional expense to represent his interests independent of Mr. Kravit after the undercover operation was disclosed. Also, it is obvious that the lengthy investigation of Kravit greatly increased the time that this case was in the preindictment stage. While no defendant enjoys a constitutionally protected right to a speedy indictment, 3½ years of preindictment investigation is a long time. It is certain here that Mr. Van Engel would have been indicted earlier and had his case resolved one way or the other sooner if the investigation of Kravit had not taken place. The investigation of Kravit has also made the post-indictment proceedings longer and much more expensive for Mr. Van Engel.

In summary, I conclude that Mr. Van Engel has been prejudiced by the actions of the government in investigating his attorney in this case. But even given this finding, what Mr. Van Engel asks for as a remedy is out of bounds. He wants the indictment dismissed. In my view,

that would be too great a penalty to impose on the government for what I have concluded it has done wrong. A remedy short of dismissal, however, is appropriate.

In fashioning a remedy for Mr. Van Engel, I return to the indictment. In my decision of February 6, 1992, I called it "bloated." Having returned to it again in this decision, I have concluded that I was too kind in my description of it back in February. It is awful. It is one of the most poorly drafted charging documents I have ever seen.

The indictment has lost 56 of the 89 counts against Mr. Van Engel via my decision of February 6. Most of those counts were dismissed because the charges were stale—outside the applicable statute of limitations. In other respects, the indictment barely survived defense motions to dismiss for duplicity and multiplicity. Even with the dismissal of 56 counts, Mr. Van Engel faces an unbelievable smorgasbord of charges in what's left of this indictment. At this time he remains charged with:

1. Conspiracy (over 6 years) to defraud two insurance companies (Aetna and Granite State) by submitting false claims of loss. Count 57.
2. Six substantive counts of mail fraud regarding the alleged insurance company swindle. Counts 30 through 34 and count 56.
3. Conspiracy (over 4 years) to defraud various grocery chains (Shultz Sav-O Stores, Inc. and Roundy's Inc.) by means of false representations. Count 66.
4. Four substantive counts of mail fraud regarding the conspiracy involving Shultz Sav-O stores. Counts 59 through 62.
5. One substantive count of mail fraud regarding the conspiracy involving Roundy's. Count 64.

6. Three counts of structuring financial transactions to evade IRS reporting requirements. Counts 75, 76, and 77.
7. Obstruction of justice. Count 78.
8. RICO. Count 79.
9. Ten counts of filing false individual and corporate tax returns. Counts 80 through 86, 88, 90, 92, and 94.
10. Conspiracy (over 7 years) to defraud the United States in the collection of taxes. County 95.

Even Al Capone[3] didn't face such a broad range of charges. If this were a football game, the government would be penalized 15 yards for piling on.

Noting the violations I have found of Mr. Van Engel's sixth amendment rights, but rejecting his claim that all counts in the indictment should be dismissed, I am led to what I think is an appropriate remedy under the unique circumstances of this case. The indictment will be pruned. A partial dismissal of the indictment as to Mr. Van Engel will be ordered. As a remedy for the violation I have found, I ORDER that the following charges against Mr. Van Engel be dismissed:

1. The RICO count, number 79.
2. The 10 substantive tax counts, 80 through 86, plus 88, 90, 92, and 94.
3. The tax conspiracy count, number 95.

These counts have been selected for dismissal for several reasons. The RICO count is the most cumbersome

---

[3] I feel comfortable using Capone's name here only because Mr. Kanter used it, as part of an analogy, before the grand jury on December 6, 1990.

and most time-consuming one to present, and for that matter to defend. Excising it from the indictment will save trial time and expense for Mr. Van Engel. Also, dismissing the RICO count has an element of sanction to it that is appropriate in this case. The tax counts, given what else is left of the indictment, do not have to be litigated in a criminal forum. A civil tax suit can be commenced by the government if it believes the tax laws have been violated.

This turn of events prompts me to revisit the order of trial and severance-joinder discussion I noted in my decision of October 7, 1992. When I last left this issue, three trials were ordered. That part of the order of October 7 is VACATED. The new order of trial will be:

Trial #1

Conspiracy to defraud Shultz/Roundy's, count 66; substantive counts re Shultz/Roundy's, counts 59, 60, 61, 62, and 64; obstruction of justice, count 78. The defendants in this trial will be Kurt Van Engel, Joseph Palmisano, Bernard Van Engel, Barbara Schwellinger, Howard Schaefer, and Eugene Knoll.

Trial #2

Conspiracy to defraud Aetna and the Granite State Insurance Company, count 57; substantive counts re Aetna/Granite, counts 30 to 36 and count 56. Defendants in this trial will be Kurt Van Engel, Lyle Van Engel, Larry Pitzen, and James Walker.

If anyone is interested in more trials after these two are completed, the remaining counts will be tried in this order:

Trial #3

Structuring financial transactions, counts 75, 76, and 77 as regards Kurt and Bernard Van Engel.

Trial #4

Substantive income tax counts, numbers 87, 89, 91, and 93 against Mr. Palmisano, and tax conspiracy, count 95, against Mr. Palmisano, Mr. Schaefer, and Bernard Van Engel.

The attorneys in trial #1 should appear in court for a scheduling conference on Friday, January 8, 1993, at noon. The defendants need not appear. A trial date for the second trial will be set after the first trial is finished.

SO ORDERED at Milwaukee, Wisconsin, this 21 day of December, 1992.

BY THE COURT:

/s/ _____
TERENCE T. EVANS
CHIEF JUDGE

Notre Dame Law School
Notre Dame, Indiana 46556

Direct Dial Number
219-239-5717

October 30, 1989

Mr. David B. Bukey
Bukey & Bentley
1111 Third Ave. Suite 1060
Seattle, WA 98101

Re: *Stephen E. Kravit*

Dear Mr. Bukey:

This will acknowledge your letter of October 6, 1989, in which you requested me to evaluate, from a prosecutive standpoint, certain materials in light of 18 U.S.C. § 1510.

My conclusion is that these materials do not present even a colorable violation of 18 U.S.C. § 1510.

I. *Personal Background*

Currently, I am a professor of law here at the Notre Dame Law School, where my subjects include Criminal Justice and Federal Criminal Law. Previously, I was a special attorney in the Department of Justice from 1960 through 1964; chief counsel of the Senate Subcommittee on Criminal Laws and Procedures, chaired by Senator John L. McClellan, from 1969 through 1973; special counsel to the minority on the Senate Judiciary Committee, ranking member, Senator Joseph Biden, from 1985 to 1986; and special counsel to House Judiciary Committee, chaired by Congressman Peter Rodino, during 1988.

While I was chief counsel to the Senate Subcommittee on Criminal Laws and Procedures, I drafted, at the Subcommittee's direction, the Organized Crime Control Act of 1970, Title IX of which is known as the Racketeer Influence and Corrupt Organizations Act (RICO). Since 1970, I have lectured on RICO in judicial, prosecutive, and plaintiff and defendant contexts. I have also written on the statute. I have also drafted or assisted in the drafting of more than half of the present 29 state RICO statutes. Finally, I have consulted or personally handled criminal and civil litigation under the federal and state statutes, participating, from a plaintiff's and a defendant's perspective, in numerous civil RICO settlements.

While I was a special counsel to the Senate Judiciary Committee in 1985 and 1986 and to the House Judiciary Committee in 1988, my responsibilities included working on hearings and legislative proposals that touched all aspects of criminal and civil litigation under RICO.

II. *Materials Received*

I have carefully reviewed the following documents:

1. the search warrant affidavit of May 13, 1988, which attaches a copy of the Baake/Van Engel October 1987 settlement agreement;
2. exchanges of correspondence leading up to and following the Baake/Van Engel agreement;
3. a copy of a letter of intent written by Mr. Kravit to counsel for Mr. Zingale, after the time of the Van Engel/Baake settlement; and
4. a copy of the civil action in *Baake v. Van Engel.*

III. *Conclusion*

My conclusion is that these materials do not present even a colorable violation of 18 U.S.C. § 1510, which, in relevant part, provides:

> Whoever willfully endeavors by means of bribery to obstruct . . . the communication of information relating to . . . any criminal statute . . . to a criminal investigator shall be fined . . . or imprisoned . . . .

The relevant jurisprudence under Section 1510 may be quickly summarized. Belief that a witness "might give information to federal officials" is sufficient for a violation. *United States v. Leisure*, 844 F.2d 1347, 1364 (8th Cir. 1988) (murder of possible witness obstruction under former version of § 1510), *cert. denied*, 109 S. Ct. 403 (1988). Actual obstruction is not required, since the statute proscribes "endeavors," *United States v. Murray*, 751 F.2d 1528, 1534 (9th cir. 1985), *cert. denied*, 474 U.S. 979 (1986), a concept less stringent than attempt. *United States v. Leisure*, 844 F.2d at 1366-67. Arguably, the statute requires actual bribes, not merely an endeavor to bribe. *See United States v. Stafford*, 831 F.2d 1479, 1483-84 (9th Cir. 1987). The matter is of little moment, however, since "willful conduct" is required on either constructure, and "willfully" means "deliberately with knowledge" or "specific intent." *United States v. Leisure*, 844 F.2d at 1366 (citing *United States v. Mekjian*, 505 F.2d 1320, 1324 (5th Cir. 1985) and *United States v. Sirhan*, 504 F.2d 818, 820 n.3 (9th Cir. 1974)). *See also*, *United States v. Carleo*, 576 F.2d 846, 849 (10th Cir.) ("Specific intent to obstruct justice"), *cert. denied*, 439 U.S. 850 (1978); *United States v. Lippman*, 492 F.2d 419 U.S. 314, 316 (6th Cir. 1974) ("specific intent to buy silence," not because of other reasons (threats)), *cert. denied*, 419 U.S. 1107 (1975). No one who did not intend to pay a bribe would fall within the statute;

good faith, too, is inconsistent with "willfully." *See, e.g., Williamson v. United States*, 207 U.S. 425, 453 (1907) (good faith inconsistent with conspiracy to suborn perjury).

My reading of the facts indicates that little more is involved here than a good faith effort to settle a pending civil matter. A settlement of the civil aspects of criminal matters is simply not illegal. *See Restatement of Contracts* § 548, p. 1053 (1932). "Chapter 73—Obstruction of Justice" does not, in short, "prohibit . . . the providing of lawful, bona fide, legal representation services in connection with or anticipation of an official proceeding." 18 U.S.C. § 1515(b).

It is difficult for me to see how this sort of settlement could be fairly construed as "bribery." Settlements, not only of RICO claims, but also of anti-trust and securities matters always involve the settlement of issues that raise at least a possibility of a parallel criminal prosecution. Confidentially agreements, too, are not unique. In fact, they are a common feature of the settlement of civil litigation generally. Far from being illegal, they maybe judicially enforced in the face of general policy considerations supporting public access to court records. *See, e.g., Bank of America National Trust & Saving Assn. v. Hotel Rittenhouse Associates*, 800 F.2d 339, 344 (3rd Cir. 1986) (common law right of access given priority over confidentiality) (sharp dissent by Garth, J); *Palmieri v. State of New York*, 779 F.2d 861, 864-65 (2d Cir. 1985) (*FDIC v. Ernst & Ernst* followed); *FDIC v. Ernst & Ernst*, 677 F.2d 230, 232 (2d Cir. 1982) (access not permitted) *affirming*, 92 F.R.D. 468, 472 (E.D.N.Y. 1981) ("[s]ecrecy of settlement terms . . . "is a well-established American litigation practice"). An effort to use the blunt instrument of the criminal law to second guess good faith civil negotiations in

the RICO—or any other area—would be, not only unauthorized and unprecedented, but also profoundly unwise.

IV. *Personal Information*

You may find it relevant to know that I have been professionally associated with Mr. Kravit's and am personally aware of his background as a former assistant in the Eastern District of Wisconsin; he and I have served together on several panels lecturing to executives, lawyers and insurance fraud investigators on the application of criminal and civil RICO in the insurance fraud area. In addition, I personally know his reputation, as a lawyer, for judgment, skill, and integrity; it is of the highest.

A prosecution on this set of facts of this individual would be a travesty of justice.

Sincerely,

/s/
G. Robert Blakey
O'Neill Professor of Law

1103 West Wisconsin Avenue
Milwaukee, Wisconsin 53233
414-288-5364

March 14, 1990

Atty. David B. Bukey
Bukey & Bentley
1111 Third Avenue, Suite 1060
Seattle, WA 98101-3202

Re: Kravit/Van Engel: Tapes Issues

Dear Mr. Bukey:

FACTS

A number of tape recordings of conversations were made over a period of approximately one year by Gerald Baake, a business associate of Mr. Kurt Van Engel. Participants in the recorded conversations, other than Mr. Baake, were not aware that the conversations were being recorded by Mr. Baake.

Mr. Baake filed a civil action against Mr. Van Engel in May of 1987, alleging RICO and other claims. Mr. Baake intended to use the tape recordings as evidence in the suit. At about the same time, a separate civil action containing parallel allegations was filed by Anthony Zingale, also a business associate of Mr. Van Engel. Both suits were soon thereafter voluntarily dismissed without prejudice.

Negotiations between Mr. Van Engel and Mr. Baake led to a settlement of all claims by Mr. Baake in October of 1987. As part of that settlement, Mr. Baake agreed to turn over to Mr. Van Engel the original tape recordings in his possession. Mr. Kravit took possession of the

tapes in October of 1987. Mr. Kravit was advised that copies of the tape recordings had been made and were in Mr. Zingale's possession.

In the summer of 1987, Mr. Kravit learned that Mr. Baake, through his attorney, had advised an Assistant United States Attorney of his claims against Mr. Van Engel and provided the Assistant United States Attorney with copies of the complaints in the civil actions. In August of 1987, Mr. Kravit met with an Assistant United States Attorney to determine whether Mr. Van Engel was the subject of an investigation related to the civil claims. Mr. Kravit was advised that no investigation was being conducted by the government at that time.

In October of 1987, Mr. Kravit delivered the original tape recordings to Mr. Van Engel. Subsequently, subpoenas were issued to both Mr. Kravit and Mr. Van Engel calling for the production of certain materials. In the course of responding to the subpoenas, Mr. Kravit truthfully advised the Assistant United States Attorney that neither he nor Mr. Van Engel had possession of the tapes.

ISSUE

You have asked for my opinion, based upon the foregoing facts, whether Mr. Kravit violated ethical norms of the legal profession by his conduct.

OPINION

Because the conduct in question occurred prior to the effective date of the current Wisconsin Supreme Court Rules of Professional Conduct for Attorneys, the relevant ethical norms are found in the Code of Professional Responsibility, *Wisconsin Court Rules and Procedures*,

Supreme Court Rules Chapter 20 (West 1987), which were then in effect. The most relevant provisions of the Code provided:

> 1) A lawyer shall . . . [p]romptly pay or deliver to the client as requested by the client . . . properties in the possession of the lawyer which the client is entitled to receive (SCR 20.50(2)(d));
>
> 2) A lawyer may not suppress any evidence that the lawyer or the lawyer's client has a legal obligation to reveal or produce (SCR 20.43(1));
>
> 3) In his representation of a client, a lawyer may not . . . [c]onceal or knowingly fail to disclose that which the lawyer is required by law to reveal (SCR 20.36(1)(c)); and
>
> 4) In his representation of a client, a lawyer may not . . . [c]ounsel or assist the client in conduct that the lawyer knows to be illegal or fraudulent (SCR 20.36(1)(g)).

1. The Duty to Deliver Property to the Client

A lawyer has a duty to deliver to the client, upon his request, any property in the lawyer's possession belonging to the client. SCR 20.50(2)(d). Client files generally belong to the client and the client is entitled to them upon completion of a matter. See, for example, State Bar Ethics Committee, Formal Op. E-82-7 ("delivery should be made to the client of all material 'which it could reasonably be anticipated would be useful to the client.' "); Formal Op. E-85-5 ("Important documents should be returned to the client if feasible . . ."). The tape recordings in Mr. Kravit's possession were part of Mr. Van Engel's case file and, as such, were property that Mr. Van Engel was generally entitled to receive from Mr. Kravit.

Moreover, the lawyer, as agent for his client/principal, is bound to follow the directions of his principal and may be liable for failing to do so. *Olfe v. Gordon*, 93 Wis. 2d 173, 286 N.W.2d 573 (1980) (". . . an attorney may be liable for all losses caused by his failure to follow with reasonable promptness and care the explicit instructions of his client" quoting Note, *Attorney Malpractice*, 63 Colum. L. Rev. 1292, 1302 (1963)). More particularly, in determining the method of disposition of client files, "the instructions and wishes of the client should be a dominant consideration." SCR 20.21(6) (ethical consideration). Thus, if Mr. Van Engel had directed Mr. Kravit, as his lawyer/agent, to turn over materials to which Mr. Van Engel was generally entitled, ethics rules and the law of agency as expressly applied to Wisconsin lawyers by the Wisconsin Supreme Court, would have required Mr. Kravit to comply with that direction, unless some affirmative duty imposed on Mr. Kravit dictated otherwise.

As a general matter, it would be incumbent on an attorney to deliver materials such as the tapes to his client, if his client so directed, absent some serious countervailing consideration.

2. The Duty not to Suppress or Conceal That Which There is an Obligation to Reveal or Produce

Under both SCR 20.43(1) and 20.36(1)(c), the duty not to suppress or conceal evidence or information is expressly conditioned on whether there is a duty to "reveal or produce" the evidence or information. Any duty to reveal or produce the tapes would be an exception to the general rule that a lawyer may not knowingly reveal a confidence or secret of his or her client. SCR 20.22(1)(a). The threshold question, therefore, is whether Mr. Kravit had a duty

to reveal or produce the tapes. If such a duty existed, it is then necessary to determine whether Mr. Kravit "suppressed" or "concealed" the tapes by delivering them to Mr. Van Engel.

Mr. Kravit was aware that the civil action by Mr. Zingale might well be re-instituted in state court. He knew that the government was not then investigating Mr. Van Engel with regard to the conduct at issue in the civil actions. Considering these facts, I am unaware of any duty imposed upon Mr. Kravit to reveal or produce the tapes. If Mr. Kravit had known of the issuance of a subpoena for the tapes, a duty to reveal or produce the tapes would arise under state or federal statutes and SCR 20.43(1) and 20.36(1)(c). No subpoena had been issued for the tapes, and, thus, no duty arose on that basis.

Some cases indicate that lawyers are legally required to turn over to prosecutors or courts fruits of apparent crime, such as stolen money, or instrumentalities of crime, such as weapons. See C. Wolfram, *Modern Legal Ethics* sec. 12.3.5 (1986). The circumstances known to Mr. Kravit were markedly different than in those cases. Mr. Kravit was informed by the Assistant United States Attorney that the conduct of Mr. Van Engel at issue in foreseeable civil claims was not then the subject of a criminal investigation. The tapes also contained statements by Mr. Van Engel, so that the tapes could not be turned over without disclosing Mr. Van Engel's identity and information about him. In this respect, the tapes are significantly different from the products or instrumentalities of crime. On the basis of these facts, Mr. Kravit would have virtually no basis for turning the tapes over to prosecutors or a court. The Code of Professional Responsibility provided:

> While serving as advocate, a lawyer should resolve in favor of his or her client doubts as to the bounds

> of the law. In serving a client as advisor, a lawyer in appropriate circumstances should give his or her professional opinion as to what the ultimate decisions of the courts would likely be as to the applicable law. SCR 20.34(1)(c) (ethical consideration).

Mr. Kravit was serving as an advocate for Mr. Van Engel with respect to the matters to which the tapes were arguably relevant. One set of claims had been settled, and another set of parallel claims was likely to be prosecuted in a state court civil action. As an advocate, Mr. Kravit was encouraged by the Wisconsin Code of Professional Responsibility to resolve doubts in favor of Mr. Van Engel as to whether he was legally bound to reveal or produce the tapes. The principle of confidentiality and Mr. Van Engel's interests dictated that Mr. Kravit not reveal or produce the tapes. At most, Mr. Kravit would be in doubt as to the bounds of the law with respect to whether he was required to reveal or produce the tapes. More likely, Mr. Kravit would find in Wisconsin law no basis whatsoever for revealing or producing the tapes. Indeed, a Memorandum Opinion by the State Bar Ethics Committee advises lawyers not to disclose information known to a lawyer about objects of a client found at a crime scene; the decision whether to disclose, according to the opinion, is the client's decision to make. State Bar Ethics Committee, Memorandum Op. 11/77.

Any other construction of the Code would create enormous ethical problems for lawyers. If lawyers were bound to evaluate all material they receive as to whether it could constitute evidence of a crime and so had to be revealed or produced, the principle of confidentiality would be lost. The mere potential that materials received by the lawyer could be evidence of a crime is far too loose a standard upon which to impose a duty to reveal or produce the

material, and no reasonable construction of the Code would support such a standard.

For these reasons, Mr. Kravit had no duty to "reveal" or "produce" the tapes, and his conduct did not violate Wisconsin ethical norms for lawyers. Even if such a duty existed, there is substantial doubt that delivering the tapes to Mr. Van Engel "suppressed" the tapes under SCR 20.43(1) or "concealed" them under SCR 20.36(1)(c). At the least, Mr. Kravit would not have suppressed or concealed the tapes by delivering them to Mr. Van Engel unless he had some substantial reason to believe that Mr. Van Engel would make the tapes unavailable.

3. The Duty Not to Counsel or Assist the Client in Conduct the Lawyer Knows to be Illegal

As established earlier, Mr. Kravit had no legal duty to "reveal" or "produce" the tapes. Having been advised that no federal criminal investigation was taking place, and knowing that a possible civil claim could be asserted in a Wisconsin state court, Mr. Kravit would properly look to Wisconsin law, including the Wisconsin ethics rules, to determine whether he had a duty to preserve the tapes.

Under Wisconsin law, Mr. Kravit had no duty to preserve the tapes. No such duty can be found in the Wisconsin Code of Professional Responsibility. See, e.g., C. Wolfram, *Modern Legal Ethics* sec. 12.3.5 (1986) ("The approach of the 1969 Code was not to create independent rules requiring preservation of evidence."). It is a violation of Wisconsin criminal law to destroy, conceal, or transfer possession of a document that has been subpoenaed by a court or by or at the request of a district attorney or the attorney general, but no such subpoena was issued for the tapes. Wis. Stat. sec. 946.60 (1987-88).

Civil sanctions can be imposed in a pending matter in which a party fails to obey an order to provide or permit discovery, but no such order was issued affecting the tapes. Wis. Stat. sec. 804.12 (1987-88).

In summary, all of the relevant Wisconsin law that Mr. Kravit could have consulted would reveal no duty to preserve the tapes. Thus, under the facts known to Mr. Kravit, even if he had counseled Mr. Van Engel to destroy the tapes, he would not have violated SCR 20.36(1)(g) or other provisions of the Wisconsin Code of Professional Responsibility.

Sincerely,

/s/
Michael K. McChrystal
Associate Professor

Wisconsin Bar Bulletin (Vol. 57, No. 6) (June 1984)

11/77, Attorney-Client Privilege; Disclosure of Information. An attorney who is aware that an object of his/her client's was found at the scene of alleged criminal misconduct is not under an ethical obligation to disclose the existence of the object or where it was found to the authorities. S/he should discuss the matter with her/his client and it is the client's decision whether to disclose the information. The attorney must, however, tell the client s/he cannot lie about the item and that s/he must tell the truth about it if questioned concerning it.

INDIANA UNIVERSITY

Office of the Dean
735 West New York Street
Indianapolis, Indiana 46202-5194

School of Law
Indianapolis

October 20, 1989

David B. Bukey, Esq.
Bukey & Bentley
1111 Third Avenue, Suite 680
Seattle, Washington 98101-3202

Re: Your Client—Stephen Kravit

Dear Mr. Bukey:

You retained me as an expert in the field of legal ethics to review certain matters in connection with your representation of Stephen Kravit, who I understand may be the subject of a federal investigation in Milwaukee in connection with his representation of Kurt Van Engel.

Specifically, you asked that I review a "Confidential Settlement Agreement" negotiated by your client on behalf of Mr. Van Engel and dated October 7, 1987. You requested that I give you an opinion as to whether Mr. Kravit engaged in unprofessional conduct in negotiating and in preparing this agreement, and in counseling his client to sign it.

I have reviewed the "Confidential Settlement Agreement," and I have consulted the Wisconsin Rules of Professional Conduct for Attorneys. I also have examined an "Affidavit" of Special Agent Richard J. Arkenberg of the Internal Revenue Service pertaining to this matter, dated

May 13, 1988, and Complaint No. 87-C-0625 filed in the United States District Court for the Eastern District of Wisconsin by Gerald Baake vs. Kurt Van Engel, et al. Finally, I have conversed extensively by phone with you concerning the facts of this case.

It is my opinion that Mr. Kravit's conduct in negotiating and in preparing the agreement was not improper and does not subject him to charges of professional impropriety under either Wisconsin rules or the American Bar Association Standards for Criminal Justice Relating to The Defense Function. It is my understanding that the agreement was executed by the parties in good faith in an effort to settle a civil dispute.

More specifically, I do not believe it was improper for Mr. Kravit to have included paragraph 8 in the "Confidential Settlement Agreement." This paragraph required Gerald Baake to deliver to Kurt Van Engel "all litigation materials, documents, work product, and any other items in his or his counsel's possession. . . ." I understand that at the time the agreement was executed Mr. Kravit had been informed by a government representative that there was a citizen inquiry concerning Van Engel's conduct, but that no investigation was then in progress. Nevertheless, in these circumstances, I believe that the delivery of litigation materials, documents, etc. to Van Engel may be viewed as an appropriate effort by counsel to comply with Standard 4-4.1 of the ABA Criminal Justice Standards Relating to the Defense Function: "[it] is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case. . . ." Moreover, I do not believe it is necessarily improper if litigation materials of the kind described in paragraph 8 of the agreement are delivered to counsel rather than to the client.

Pursuant to your request, I am enclosing a copy of my curriculum vitae. As you can see, I have had extensive experience in the areas of professional responsibility and criminal defense ethics. I am currently a member of the Editorial Board of the ABA/BNA Lawyers' Manual on Professional Conduct and previously served as the board's chairperson. I was the Reporter for the second edition of the ABA's Criminal Justice Standards Relating to the Defense Function, and I now serve, by appointment of the President of the ABA, as the chairperson of the ABA committee charged with responsibility for updating all of the Association's Criminal Justice Standards, including The Defense Function Standards. I also served as Chairperson of the ABA Section of Criminal Justice during 1986-1987.

As noted at page 8 of my curriculum vitae, I frequently have been retained as an expert on issues of professional responsibility and competence of representation. In addition, I have published articles pertaining to professional responsibility and lectured on the subject. I have taught professional responsibility in law schools every year since 1975. For a number of years, I lectured on professional responsibility to students preparing to take the bar examination in Georgia and North Carolina.

Please feel free to let me know if you require any additional information at this time.

Sincerely,

Norman Lefstein
Dean and Professor of Law

Enclosure

Supreme Court, U.S.
FILED
APR 20 1994
OFFICE OF THE CLERK

(2)

No. 93-1513

In The

Supreme Court of the United States

October Term, 1993

KURT HENRY VAN ENGEL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

AMICUS BRIEF OF THE NATIONAL ASSOCIATION FOR CRIMINAL DEFENSE LAWYERS IN SUPPORT OF THE PETITION OF KURT HENRY VAN ENGEL FOR A WRIT OF CERTIORARI

Counsel for Amicus:

PROFESSOR ALLEN E. SHOENBERGER
Loyola Law School
One East Pearson
Chicago, Illinois 60611
(312) 915-7141

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

26 pp

QUESTIONS PRESENTED

I. The prosecution launched a sting operation without any sound basis against a lawyer for a client under investigation and pursued it for two years without any evidence or leads to evidence of illegal conduct, impeding the effectiveness of counsel on behalf of the client and causing significant delay and expense for the client. The question presented is:

Can a prosecutor in a complicated white collar investigation wrongfully interfere with a putative defendant's relationship with his lawyer without violating the Fifth or Sixth Amendments, and without consequence to his case?

II. A second question is also subsumed in the first:

Should Harmless Error be Defined by Relationship to Conviction Reversing Impact or, According to Terms of the Federal Statute, by Effect on Substantial Rights?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

Interest of the Amicus 1

Consent of the Parties 2

Statutes and Rules Involved 2

Statement of Facts 3

Summary of the Case:
Importance of the Issues Presented 3

Argument 5

The Importance of Preventing Unwarranted Prosecutorial Interference With The Right to Counsel Before Indictment or Information 5

The Rise of Charge Bargaining under the Federal Sentencing Guidelines Means that Rules Adopted by This Court Regarding the Time at Which the Application of the Sixth Amendment Right to Counsel Attaches are Impractical 8

Should Harmless Error Be Defined by Relationship to Conviction Reversing Impact or, According to Terms of the Federal Statute, by Effect on Substantial Rights? 15

CONCLUSION 19

TABLE OF AUTHORITIES

Page

CASES

Bank of Nova Scotia v. United States, 487 U.S. 250 (1988) 17

Chapman v. California, 386 U.S. 18 (1967) 17

Demjanjuk v. Petrovsky, 10 F.3d 338 (6th Cir. 1994) 7

Faretta v. California, 422 U.S. 806 (1976) 14

Kotteakos v. United States, 328 U.S. 750 (1946) 18, 19

State v. Campbell, 109 S.W. 706 (Mo. 1908) 16

United States v. Andrews, 824 F.Supp. 1273 (N.D. Ill. 1993) 7

United States v. Boyd, 833 F.Supp. 1277 (N.D. Ill. 1993) 7

United States v. Burnside, 824 F.Supp. 1215 (N.D. Ill. 1993) 7

United States v. Irvin, 2 F.3d 72 (4th Cir. 1993), cert. denied, 114 S.Ct. 1086 (1994) 9

United States v. Lun, 944 F.2d 642 (9th Cir. 1991) 8

United States v. Morrison, 449 U.S. 361 (1981) 16, 17

United States v. O'Campo, 973 F.2d 1015 (1st Cir. 1992) 9

United States v. Saldana, 12 F.3d 160 (9th Cir. 1993) 10

Xiao v. Barr, 979 F.2d 151 (9th Cir. 1992) 8

TABLE OF AUTHORITIES – Continued

Page

STATUTES AND RULES

28 U.S.C.A. § 2111 ..... 2, 15, 17, 18

Act of February 26, 1919, ch. 48, 40 Stat. 1181... 2, 16, 19

Federal Rule of Criminal Procedure 52(a)...2, 5, 15, 17, 18

Federal Rule of Criminal Procedure 7(b) 8

Sentencing Guideline § 5K1 10

House Report No. 1949, 61st Congress, 3d Session (1911) 16

OTHER AUTHORITIES

Alschuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for "Fixed" and "Presumptive" Sentencing*, 126 U. Pa. L. Rev. 550 (1978) 9

Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U.Chi.L.Rev. 901 (1991) 12

Another Rukn Case Figure Gets a Pass, Chicago Tribune, Jan. 28, 1994, Chicagoland Section, p.4..... 7

Annual Report of the Director of the Administrative Office of the United States Courts (1989)..... 12

Gardner & Rifkind, *A Basic Guide to Plea Bargaining under the Federal Sentencing Guidelines*, Section of Criminal Justice of the ABA, 7 Sum. Crim. Just. 14 (1992)..... 12

Gershman, *Prosecutorial Misconduct* (1985) 5, 6

Hansen, *Gang Convictions Challenged*, 79 March A.B.A.J. 28 (1993)..... 7

TABLE OF AUTHORITIES – Continued

Page

Heaney, *The Reality of Guidelines Sentencing: No End to Disparity* 28 Am. Cr. L. Rev. 161 (1991) 11

Henning, *Testing the Limits of Investigating and Prosecuting White Collar Crime How Far Will the Courts Allow Prosecutors to Go?* 54 U.Pitt. L. Rev. 405 (1993) 4

Kolb, *Excess in the Legal System*, 31 No. 3 Judges J. 22 (1992) 6

Lawless, *Prosecutorial Misconduct, Law – Procedure – Forms* (1985) 5

Lear, *Is Conviction Irrelevant?*, 40 U.C.L.A. L. Rev. 1179 (1993) 8, 13

McCall, *The Emperor's New Clothes: Due Process Considerations Under the Federal Sentencing Guidelines*, 60 Tenn. L. Rev. 467 (1993) 8

Moore, *Intra-Professional Warfare Between Prosecutors and Defense Attorneys: A Plea for an End to the Current Hostilities*, 53 U. Pitt. L. Rev. 515 (1992) 8

Nagel & Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices under the Federal Sentencing Guidelines*, 66 S.Cal. L. Rev. 501 (1992) 11, 12, 13

Proceedings of the Fifty-Third Judicial Conference of the District of Columbia Circuit, 145 F.R.D. 149 (1993) 13

Raeder, *Gender Issues in the Federal Sentencing Guidelines and Mandatory Minimum Sentences*, 8 Fall Crim. Just. 20 (1993) 11

TABLE OF AUTHORITIES - Continued

Page

Reddy, *Guilty Pleas and Practice, Eighth Survey of White Collar Crime Procedural Issues*, 30 Am. Crim. L. Rev. 1117 (1993) 13

Schulhofer, *Due Process at Sentencing*, 120 U. Pa. L. Rev. 733 (1980) 9

Schulhofer, *Assessing the Federal Sentencing Process: The Problem is Uniformity not Disparity*, 29 Am. Crim. L. Rev. 833 (1992) 12

7 Rukns Cut Deal for New Prison Sentence, Chicago Tribune November 30, 1993, Chicagoland, p.1 7

Yellen, *Illusion, Illogic, and Injustice: Real Offense Sentencing and The Federal Sentencing Guidelines*, 78 Minn. L. Rev. 403 (1993) 12

Zacharias, *Specificity in Professional Responsibility Codes: Theory, Practice and the Paradigm of Prosecutorial Ethics*, 69 Notre Dame L. Rev 223 (1993) 15

Interest of the Amicus

The National Association of Criminal Defense Lawyers (NACDL) is a District of Columbia non-profit corporation whose membership is comprised of more than 7,000 regular members and 25,000 affiliate members representing lawyers from every state. Members serve in positions bringing them into daily contact with the criminal justice system in the state and federal courts. Members of the NACDL regularly represent defendants in federal criminal trials and appeals. Many of its members are CJA panel attorneys who represent indigent clients.

The NACDL is the only national bar organization working exclusively on behalf of public and private criminal defense lawyers and their clients. The American Bar Association recognizes the NACDL as an affiliated organization and awards it full representation in the ABA House of Delegates. The NACDL is dedicated to the preservation and improvement of our adversarial system of justice. The Amicus Curiae Committee of the NACDL has discussed this case and decided this issue is of such importance to the representation of criminal defendants and to defense lawyers through the nation that the NACDL should offer its assistance to the Court. The Prosecutorial Misconduct subcommittee has also indicated its concern with this case.

One of the primary concerns of the NACDL, its membership and affiliates, is the accused's right to effective and vigorous representation by competent and effective counsel who hold the interests of their clients primary in

their representation. The admitted conduct of the prosecution attorneys in the case at bar poses serious questions about such effective and vigorous representation in the future – not only for criminal defendants but also for civil litigants.

Consent of the Parties

Both parties have consented to the filing of this Amicus Brief in Support of the Petition of Kurt Henry Van Engel for a Writ of Certiorari.

Statutes and Rules Involved

"28 U.S.C.A § 2111. Harmless error.

On the hearing of any appeal or writ of certiorari in any case the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties." (Enacted May 24, 1949, c. 139, Sec. 110, 63 Stat. 105.)

"Federal Rule of Criminal Procedure 52. Harmless error

a) Harmless error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

The first federal harmless error law, Act of February 26, 1919, ch. 48, 40 Stat. 1181, stated:

"All of the said courts shall have power to grant new trials, in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in

the courts of law. On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defenses, or exceptions which do not affect the substantial rights of the parties."

Statement of Facts

Amicus relies upon the statement of facts contained at pp. 3-10 in the petition for certiorari filed in this case.

Summary of the Case: Importance of the Issues Presented

This case presents a clear case of substantial prosecutorial misconduct, as determined by both the United States District Court for the Eastern District of Wisconsin and the United States Court of Appeals for the Seventh Circuit, but for which misconduct the Seventh Circuit deemed no remedy appropriate. This prosecutorial misconduct had multiple impacts: it not only impacted on the ongoing criminal representation of the accused, Mr. Van Engel by causing the retention of a replacement criminal counsel while Mr Van Engel's original attorney, Mr. Kravit, was under investigation; it also delayed the processing of the criminal case by nearly two years during phony negotiations with Mr. Van Engel's original attorney, Mr. Kravit. In effect, for several years the prosecutor manipulated the defense representation like a puppet on a string. The district court found that this

misconduct impacted in a prejudicial manner permeating *both the pre and post indictment phases and that it would impact upon the trial.*

Not only does the case present important questions about the Sixth Amendment right to representation by counsel, it also presents serious questions about due process limits upon the government's ability to infringe with impunity the Fifth Amendment due process right to counsel in civil cases. Mr. Kravit was originally Mr. Van Engel's civil attorney in negotiating settlements to several civil RICO cases. Permitting remediless harm in situations such as the instant case impacts upon the right to a civil attorney, for it suggests that the value of such attorney's knowledge and experience with the affairs of a client are not an asset but a potential snare and danger to the client. If that civil lawyer can become the target of baseless sting operations, the client can never trust a civil lawyer. Instead of a helpful counselor, such civil attorneys suddenly become "potential co-conspirators." It is ironic that the most ethical and honorable attorneys are most hurt by the Seventh Circuit's decision. The instant case presents an unfortunate illustration, for the lawyer who became the target of the baseless sting was himself a former Assistant United States Attorney – a group from whom we presume relatively few felons emerge.

When prosecutors engage in "egregious misconduct" in the process of investigating criminal activity, "the proper focus should be on whether the government's conduct has breached the standard of fundamental fairness, constituting a violation of the defendant's due process rights. . . . " Henning, *Testing the Limits of Investigating and Prosecuting White Collar Crime: How Far*

Will the Courts Allow Prosecutors to Go?, 54 U.Pitt. L. Rev. 405, 474 (1993). Unfortunately, that focus was lost in the decision by the Seventh Circuit.

Moreover, this case also enables examination of whether this Court should exercise its supervisory power over federal courts to ensure that justice appears to be even handed and balanced, and that prosecutors are not seen as having unlimited power to abuse defendants' rights, under the federal harmless error statute and Federal Rule of Criminal Procedure 52(a). The Seventh Circuit's opinion would only check such abuse if the investigation turns up evidence subject to suppression in the case in chief. Had a defense attorney engaged in similar conduct with respect to a prosecutor, it is probable that such an attorney would risk several serious criminal charges including obstruction of justice. It is suggested that an important question related to the application of the harmless error test is presented by this case.

Argument

The Importance of Preventing Unwarranted Prosecutorial Interference With The Right to Counsel Before Indictment or Information

Prosecutorial misconduct is unfortunately today not just a matter of quality control in selecting Assistant United States Attorneys: It threatens to strike at the core legitimacy of the American criminal justice system. One measure of the perceived growth of such misconduct is that at least two treatises have been published with regular updating: Gershman, *Prosecutorial Misconduct*, (1985), and, Lawless, *Prosecutorial Misconduct, Law – Procedure – Forms* (1985). "Misconduct is commonly met with judicial

passivity and bar association hypocrisy." (Gershman, *supra* at Intro., ix) Another very rough measure is the astounding increase in the numbers of published opinions in which such prosecutorial misconduct is alleged over the last two decades: an increase of 1623 percent in federal courts and of 3180 percent in state courts![1]

The sanctions this Court has previously ratified regarding prosecutorial misconduct apply realistically only to misconduct that occurs in front of the court during trial. Yet prosecutorial misconduct can take many other shapes that only accidentally comes to the attention of the court or the defense counsel. "As courts and commentators have noted . . . the existing sanctions are either too infrequently employed or ineffective to punish or prevent misconduct." Gershman, *supra*, at Sec. 13-1.

On the civil side, the threat of the federal prosecutors to freeze all of the assets of the law firm of Kaye, Scholer, Fierman, Hays, and Handler, resulted in a $41 million settlement 6 days later because as the Wall Street Journal described, the tactic "sapped Kaye, Scholer's will to fight." Kolb, *Excess in the Legal System*, 31 No. 3 Judges J. 22, 38 (1992). Yet, Kaye, Scholer had vigorously denied any liability.

On the criminal side, federal prosecutors in Chicago have been found involved in smuggling contraband into

---

[1] The ALLFEDS database of Westlaw indicates that for the decade 1965-1974, only 175 cases contain the phrase "prosecutorial misconduct"; for the decade 1975 - 1984, 1137 such cases are reported; but for the decade 1985 - 1994, 2841 cases are reported. The comparable state figures (ALLSTATES database) are 158 cases, 2335 cases and 5025 cases.

jail cells and facilitating special (sexual) favors for cooperating witnesses that had facilitated a series of impressive victories against the notorious El Rukn gang. Hansen, *Gang Convictions Challenged*, 79 March A.B.A.J. 28 (1993). *See United States v. Boyd*, 833 F.Supp. 1277, 1281 (N.D. Ill. 1993) (reversing convictions of some of the most hardened and anti-social criminals in the history of Chicago in a case described as tragic, involving the squandering of millions of taxpayers' dollars, tainting hard-earned and well-deserved reputations for professionalism in the United States Attorney's Office for the Northern District of Illinois, because in part the lead prosecutor "was willing to abandon fundamental notions of due process of law and deviate from acceptable standards of professional conduct."); *United States v. Andrews*, 824 F.Supp. 1273 (N.D. Ill. 1993); *United States v. Burnside*, 824 F.Supp. 1215 (N.D. Ill. 1993). All too many of these "victories" have been sapped by subsequent trivial sentences in many of these El Rukn cases. *7 Rukns Cut Deal for New Prison Sentence*, Chicago Tribune November 30, 1993, Chicagoland, p.1 (20 year sentences converted to time served); *Another Rukn Case Figure Gets a Pass*, Chicago Tribune, Jan. 28, 1994, Chicagoland Section, p.4. (sentence reduced to one year, time already served.)

Nor are such problems confined to Chicago prosecutors. For example, the case of John Demjanjuk (allegedly Ivan the Terrible of the Treblinka death camp) only recently resulted in an Sixth Circuit opinion castigating the prosecutor's "win at any cost" philosophy. *Demjanjuk v. Petrovsky*, 10 F.3d 338, 355 (6th Cir. 1994). In the Ninth Circuit the government sought to use testimony of a Chinese drug informant who revealed on the witness

stand that his confession had been tortured out of him by officials of the Peoples Republic of China and who then sought asylum, causing the drug case to fall apart. (Some of these PRC officials were apparently permitted to flee this county right after the testimony.) Subsequently the United States government attempted to repatriate that recanting witness to the PRC. *Xiao v. Barr*, 979 F.2d 151 (9th Cir. 1992); *United States v. Lun*, 944 F.2d 642 (9th Cir. 1991).

Win at any cost philosophy may not be confined to criminal prosecutors, but it is certainly a philosophy deserving of firm rejection from this Court, even though "each side truly believes it is at war with the other." Moore, *Intra-Professional Warfare Between Prosecutors and Defense Attorneys: A Plea for an End to the Current Hostilities*, 53 U. Pitt. L. Rev. 515, 517 (1992).

The Rise of Charge Bargaining under the Federal Sentencing Guidelines Means that Rules Adopted by This Court Regarding the Time at Which the Application of the Sixth Amendment Right to Counsel Attaches are Impractical

Ever since enactment of the Federal Sentencing Guidelines, plea negotiations for preindictment pleas have greatly increased, as was predicted would be the case.[2] According to Rule 7(b) of the Federal Rules of

---

[2] "Well before the adoption of the Guidelines, scholars warned that charge bargaining could undermine the success of the Guidelines' efforts." Lear, *Is Conviction Irrelevant?*, *supra*, 40 U.C.L.A. L. Rev. 1239 n. 121. *See* McCall, *The Emperor's New Clothes: Due Process Considerations under the Federal Sentencing*

Criminal Procedure an individual can waive indictment and proceed by presentment of an information. This can be of particular value to defendants because it can create significant favorable results in many Guidelines sentence computations. This preindictment, precharge, negotiation requires competent counsel – counsel versed both in complicated guidelines issues as well as the substantive federal criminal law.

Early dispositions can affect relevant conduct. For example, the Fourth Circuit recently ruled in *United States v. Irvin*, 2 F.3d 72 (4th Cir. 1993), *cert denied*, 114 S.Ct. 1086 (1994) that a member of a conspiracy is not responsible for drug amounts that were not reasonably foreseeable to that individual. Individual accountability and reasonable foreseeability are judicial determinations which also control mandatory minimums. *Id.; Accord, United States v. O'Campo*, 973 F.2d 1015, 1024 (1st Cir. 1992). A negotiated preindictment plea can foreclose otherwise potential adverse relevant conduct recited in an indictment. Indeed, a preindictment plea containing a carefully worded statement of fact is important for the court to consider at sentencing on the issues of relevant conduct.

Guidelines, 60 Tenn. L. Rev. 467, at 500 n. 173 (discussing "Gamesmanship") and also at 520 n. 307 (prosecutors now have a vast arsenal of weapons to choose from in sentencing) (1993). *See generally*, Albert W. Alschuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for "Fixed" and "Presumptive" Sentencing*, 126 U. Pa. L. Rev. 550 (1978) (Which noted that "charge" bargaining, rather than "sentence" bargaining, is particularly prevalent in jurisdictions in which mandatory sentencing has shifted discretion from the courts (in sentencing) to the prosecution (in charging).); Schulhofer, *Due Process at Sentencing*, 120 U. Pa. L. Rev. 733, at 757-72 (1980).

See United States v. Saldana, 12 F.3d 160 (9th Cir. 1993) (federal court has no discretion to decline to consider stipulation of facts for sentencing purposes).

A preindictment charge bargain (dismissal or non-filing of some charges in return for a plea of guilty to other charges) can also limit the offense for which other conduct might be "relevant" under the Guidelines. Not only do preindictment pleas control maximum and minimum penalties but they also provide a basis for a three level reduction as to the offense because of Acceptance of Responsibility.

In some cases, an individual may wish to actively cooperate with the prosecutors before charges are brought. This sort of preindictment negotiation by competent counsel can provide such an individual with a reduction of sentence under Guideline § 5K1.

In all of the foregoing circumstances, it is critical that an individual have competent counsel prior to indictment. The citizen need not be charged to learn of the existence of an investigation – as was the case for Mr. Van Engel. In some cases, for example, a minor charge in state court may reveal a pending larger investigation into more serious federal charges. Competent counsel, aware of what the government may or may not actually be able to prove and familiar with the intricacies of the Federal Sentencing Guidelines, can protect a client's interest through early plea negotiations.

Even though there have been attempts to prevent such precharge bargaining by issuance of Department of Justice policy restrictions it is "common knowledge among practitioners in federal courts that the policy is

sometimes ignored, and strictness in adhering to the policy varies not only from one judicial district to another but also within the same district. Supervision of the plea bargaining practices of line prosecutors, whether by [the Department of] Justice or the U.S. attorney in a given district (especially in a large office), is sometimes loose. . . . " Heaney, *The Reality of Guidelines Sentencing: No end to Disparity.* 28 Am. Cr. L. Rev. 161, 190-91 (1991). To add quality control problems among prosecutors (as in the instant case) only heightens the potential importance of pre-charge negotiations by competent defense counsel. Indeed, "since case pressure is a universal problem, the . . . policy could be read to grant the U. S. Attorneys unfettered discretion to approve charge bargaining." Nagel & Schulhofer, *A Tale of Three Cities: An empirical Study of Charging and Bargaining Practices under the Federal Sentencing Guidelines,* 66 S.Cal.L. Rev. 501, 511 (1992)[3]

---

[3] The heavy load of criminal cases has been recognized by the Federal Courts Study Committee which reported "that some prosecutors and defense counsel evade and manipulate the guidelines to induce the guilty pleas necessary to deal with increased criminal caseloads." Heaney, *Reality of Guidelines Sentencing, supra,* at 28 Am. Crim. L. Rev. 161, 191). Public defenders in one large metropolitan center reported that individuals arrested with 50 pounds or less of marijuana were routinely permitted to plead guilty to a misdemeanor charge with a maximum sentence of one year, while a felony charge for 50 pounds of marijuana would result in a sentence range of 27 to 33 months for a first offender. *Id.* Other examples cited included disparities of as long as fourteen years. *Id.* There is preliminary evidence that such bargaining may particularly detriment women offenders (who may not have enough valuable information to bargain with) such as with respect to downward departures for substantial assistance. Raeder, *Gender Issues in*

Whatever the desirability of such bargaining, the plain fact is that it is widespread, particularly prevalent

---

the Federal Sentencing Guidelines and Mandatory Minimum Sentences, 8 Fall Crim. Just. 20, 61 (1993). *See also*, Yellen, *Illusion, Illogic, and Injustice: Real Offense Sentencing and the Federal Sentencing Guidelines*, 78 Minn. L. Rev. 403, esp. 446-448 (1993).

Plea bargaining is critical to the day to day operation of the criminal justice system. In fiscal 1989, 87 percent of the criminal convictions in United States District Courts were by pleas of guilty or nolo contendere. (Annual Report of the Director of the Administrative Office of the United States Courts, 1989, p. 122, Table S15). "In a regime of sentencing guidelines, bargaining about the charge is also bargaining about the sentence." Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U.Chi.L.Rev. 901, 926 n.89 (1991). Indeed, "[Charge] bargaining has enormous impact on the Guidelines sentence. . . . " Schulhofer, *Assessing the Federal Sentencing Process: The Problem is Uniformity not Disparity*, 29 Am. Crim. L. Rev. 833, 845 (1992). "The advantage of charge bargaining is that the defendants can pick the crime with the most favorable sentencing scheme under the Guidelines, thereby determine the sentence range." Gardner & Rifkind, *A Basic Guide to Plea Bargaining Under the Federal Sentencing Guidelines*, Section of Criminal Justice of the ABA, 7 Summer Crim. Just. 14, 15 (1992) The acumen of the defense attorney is quite important for, "If the stipulation includes facts supporting a more serious offense, then the court must use the Guidelines sentence for the more serious offense. (Guidelines § 1B1.2(a))" (*Id.*)

Charge bargaining is widespread as demonstrated by empirical research under the current sentencing guidelines, but the full extent of the practice is difficult to measure since the practice itself "makes it difficult to discern the extent and nature of guideline circumvention . . . because our best window on potential circumvention is to trace the differences between indictment charges and conviction charges. If the negotiation occurs before indictment, as it apparently sometimes does . . . circumvention is almost impossible . . . to detect. "Nagel & Schulhofer, *supra*, 66 S.Cal. L. Rev. at 516. In one district studied

in both white collar and drug cases, and substantially impacts upon the results in *more* criminal cases than actually are decided at trial or by any other manner! The lower estimate is that 20 percent of plea bargains involve

---

such preindictment charge bargaining was largely confined to white collar cases. *Id.* Moreover, quality control problems have been discovered in the districts studied regarding the training and knowledge of the guidelines by both the AUSA's and the U.S. Attorneys as well. (*Id.* at 547) Such a picture is discouraging but pales against the description of one Chief Federal Defender as showing "frighteningly little sophistication in guidelines issues." (*Id.* at 547)

"[T]here has been a [post-Mistretta] diminution in date bargaining. However, fact bargaining, charge bargaining, and guideline-factor bargaining continue unabated." (*Id.* at 547) See generally, Lear, *Is Conviction Irrelevant?*, 40 U.C.L.A. L. Rev. 1179, (1993) (esp. at 1180 n. 2 and authorities cited therein.) "Fact bargaining occurs most often with respect to the amount of drugs or the particular drug involved, such as substitution of cocaine for crack, or in the dollar amount involved in economic crime." Nagel & Schulhofer, *supra*, 66 S.Cal. L. Rev. at 547).

Sentencing Commissioner Ilene Nagel reported in 1992 that a detailed review of 800 cases with 300 interviews indicated guidelines circumvention in from 20 to 35 percent of the cases resolved through a plea bargain. Proceedings of the Fifty-Third Judicial Conference of the District of Columbia Circuit, 145 F.R.D. 149 (1993). Commissioner Nagel reported that all of these types of bargaining redounded to the benefit of the defendant and that "Circumvention is much more likely in white collar cases." (*Id.*) For example separate acts of bribery must be encompassed in a actual count of conviction to be factored into the guideline range. Reddy, *Guilty Pleas and Practice, Eighth Survey of White Collar Crime Procedural Issues*, 30 Am Crim. L. Rev. 1117, 1134 (1993). Civil consequences may also attend charge bargaining, such as "a preindictment plea . . . sav[ing] the client's financial resources in subsequent civil litigation." (*Id.* at 1135)

charge bargaining, fact bargaining or guideline bargaining, but only 13 percent of federal criminal cases are decided by methods other than pleas of guilty or nolo contendere. *Supra*, p. 11, n. 3.

Any rule that permits the prosecution an unfettered ability to commit prosecutorial misconduct prior to indictment in reality impacts upon the Sixth Amendment right to counsel in a most callous way. It smacks of Star Chamber which also jeopardized the defense attorney with threats of extreme personal sanctions. While the defense attorney in this case was not subject to the extreme Star Chamber penalty of "loss of his university degrees, . . . stand[ing] twice in the pillory, and . . . hav[ing] one ear cut off each time," *Faretta v. California*, 422 U.S. 806, 823 n. 18 (1976), the likely effect of such outrageous conduct on an attorney's legal practice is not all that different. The impact upon vigorous defense representation in the future is just as pernicious.

The value of legal representation prior to indictment under the new Federal Sentencing Guidelines is thus obvious to defendants who are guilty of some offense. Unfortunately, the same is true of those defendants who, while not guilty of anything, are tempted to resolve the uncertainty in their lives by means of a plea. The Seventh Circuit's opinion gives a potent weapon to prosecutors to increase the costs of competent defense, a weapon that may increase the number of innocent defendants who succumb to the overwhelming emotional and economic pressure upon them to plead guilty. To assert that "substantial rights" are not involved because an indictment has not been returned, blinks reality.

There are no realistic controls upon such misconduct other than judicial intervention. Unfortunately, "pressures inducing appropriate [prosecutorial] behavior are virtually nonexistent. . . . [T]he combination of special defenses and practical obstacles to winning civil lawsuits against prosecutors virtually immunize prosecutors from personal liability. . . . [Other] factors include . . . defense lawyers . . . fear . . . [of] retaliation, the tendency of jurors to side with prosecutors and disbelieve criminal defendants . . . and the [likely] limited recovery. . . . " Zacharias, *Specificity in Professional Responsibility Codes: Theory, Practice and the Paradigm of Prosecutorial Ethics*, 69 Notre Dame L. Rev. 223, at 256-7, n. 101 (1993). Without judicial intervention there are no practical limits upon such prosecutorial misconduct. With the advent of the Guidelines, it is all the more apparent that a putative accused needs competent, effective counsel well before charges are brought. If an individual has entered into a private arrangement to retain counsel early in the process – as was the case for Mr. Van Engel – it is unreasonable for courts to allow deliberate government interference.

Should Harmless Error Be Defined by Relationship to Conviction Reversing Impact or, According to Terms of the Federal Statute, by Effect on Substantial Rights?

Underlying the structure of the Seventh Circuit's decision in this case is a mistaken application of the harmless error analysis mandated by 28 U.S.C. § 2111 and Federal Rule of Criminal Procedure 52(a). When the Seventh Circuit determined that no remedy was available, the decision also misapplied the precedents of this Court.

Harmless error refers to error that does not affect "substantial rights of the parties." It is not limited – as the Seventh Circuit misinterpreted – to error that directly affects the decision as to guilt. The Seventh Circuit's decision seriously misreads both this Court's precedents and the actual text of federal harmless error rules and statutes which speak of "substantial rights of the parties."

Current case law regarding the harmless error test often gives the impression that all that matters is the conviction reversing potential of asserted error. *United States v. Morrison*, 449 U.S. 361 (1981), may sometimes be read as limited to the "adverse effect" of a conviction. If the reviewing court cannot firmly determine that the result of a trial would have been different without the error, then that error is deemed "harmless."

Yet, the harmless error statute does not by its terms either require or permit the equating of "substantial rights" with "conviction reversing potential." Indeed, the first federal harmless error statute defined harmless error by a negative reference: harmless error was not mere, "technical errors,[4] defenses or exceptions." 40 Stat. 1181.

---

[4] A much repeated example of the improper practice prior to federal "harmless error review" was the reversal of a criminal conviction because the indictment left out the word "the" so that the indictment read only "against the peace and dignity of ["the" omitted] State." (*See*, e.g., House Report No. 1949, 61st Congress, 3d Session (1911) which discussed an earlier harmless error proposal and cited *State v. Campbell*, 109 S.W. 706 (Mo. 1908).) The example of the missing "the" was frequently cited in both House and Senate reports as well as in Congressional debates over harmless error bills as a technical error that ought not to result in a reversal. By contrast, the words "substantial

"Substantial rights of the parties" are not defined by reference in 28 U.S.C.A. § 2111 to the "correct result of a trial."

This Court's harmless error analysis explicitly underlies many of the case lines that underpin the Seventh Circuit's decision in this case. *See Bank of Nova Scotia v. United States*, 487 U.S. 250, 254-55 (1988) (which specifically stated that supervisory authority may not be permitted to conflict with the harmless error inquiry mandated by the Federal Rules of Criminal Procedure 52(a)). *Chapman v. California*, 386 U.S. 18, 22 (1967) recognized that all 50 states and the United States had adopted harmless error rules. The *Chapman* analysis was specifically referred to in *United States v. Morrison*, 449 U.S. 361, 365 (1981), which also stated "our approach has thus been *to identify and then neutralize the taint by tailoring relief appropriate* in the circumstances to assure the defendant the effective assistance of counsel and a fair trial. The premise of our prior cases is that the constitutional infringement identified *has had or threatens some adverse effect upon the effectiveness of counsel's representation or has produced some other prejudice to the defense*" (emphasis added). This Court expressly noted in *Morrison* that no claim of continuing prejudice or even discernible taint had been raised. (440 U.S. at 365, n. 2) Thus, in sharp contrast to the instant case in *Morrison*, there was no credible claim of harm or other prejudice to the defendant.

---

rights" were discussed as the opposite of trivial or inconsequential error – they were not then, nor should they now be construed to refer to conviction reversing impact.

Application of the ordinary harmless error test of *Kotteakos v. United States*, 328 U.S. 750 (1946), is particularly difficult in cases, such as the instant one, in which no trial has yet taken place. Reviewing courts must always speculate about the level of constitutional taints upon the trial, but normally the courts have a trial record to examine. Reviewing courts in the instant case must "double speculate," both about the nature of the potential trial as well as the impact of the prosecutorial misconduct on that trial. *Kotteakos* rejected such nebulous speculation. This Court stated, "[I]t is not the appellate court's function to determine guilt or innocence. Nor is it to speculate upon probable reconviction and decide according to how the speculation comes out . . . " Errors are to be, "not singled out and standing alone, but [taken account] in relation to all else that happened." *Kotteakos*, 763-764. (citations omitted).

The all "else that happened" in the case at bar includes serious error (prosecutorial misconduct) that increased the financial cost of criminal defense during years of futile negotiations and also added years of uncertainty and emotional turmoil for Mr. Van Engel, all events subsequent to the *known* commencement of the grand jury proceeding targeting Mr. Van Engel and the execution of the search warrant on his offices. This impact upon a defendant's rights simply cannot be properly categorized as "not affecting substantial rights."

It would be better to adhere to the text of Federal Rule of Criminal Procedure 52(a) which defines harmless error not by relationship to "taint speculation" or "conviction reversing impact" but by relation to an effect on substantial rights. *See also* 28 U.S.C.A. § 2111, as well as

the first federal harmless error statute, Act of Feb. 26, 1919, ch. 48, 40 Stat. 1181. The district court's factual determinations of the taint "affecting substantial rights" should stand unless clearly erroneous.

We submit that examination of both this Court's reasoning in *Kotteakos v. United States*, 328 U.S. 750 (1946), as well as the plain text and legislative history of federal harmless error statutes and rules, makes clear that harmless error was never contemplated to be limited to result reversing potential. The error that counts is not limited to error that impacts upon the correctness of the verdict. The error that counts is that which "affects substantial rights of the parties." This question is of such importance it merits this Court's attention.

CONCLUSION

We respectfully suggest that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Seventh Circuit for these important questions presented.

Respectfully submitted,

Counsel for Amicus:

PROFESSOR ALLEN E. SHOENBERGER
Loyola Law School
One East Pearson
Chicago, Illinois 60611
(312) 915-7141

Supreme Court, U.S.
FILED
MAY 12 1994
OFFICE OF THE CLERK

No. 93-1513

In the Supreme Court of the United States

OCTOBER TERM, 1993

KURT HENRY VAN ENGEL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1513

KURT HENRY VAN ENGEL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the court of appeals erred in reversing the order of the district court dismissing 13 counts of the indictment in this case.

1. On January 3, 1991, petitioner was indicted by a grand jury sitting in the Eastern District of Wisconsin. The indictment charged petitioner with mail fraud, in violation of 18 U.S.C. 1341; obstruction of justice, in violation of 18 U.S.C. 1503; racketeering, in violation of the RICO statute, 18 U.S.C. 1962(c); tax fraud, in violation of 26 U.S.C. 7206(1) and (2); and conspiracy to defraud the United States, in violation of 18 U.S.C. 371.[1]

[1] Initially, the indictment charged petitioner with 89 counts, and the district court dismissed 56 of those counts, primarily on

On December 21, 1992, the district court dismissed the RICO count, 11 tax fraud counts, and the conspiracy count as a sanction for what the court regarded as the government's interference with petitioner's Sixth Amendment right to counsel in its criminal investigation of his attorney, Stephen Kravit. Pet. App. 14a-44a. The court found that the two-year investigation of Kravit, a former Assistant United States Attorney, far exceeded what was necessary, and caused prejudice to petitioner because the investigation interfered with the attorney-client relationship. The court specified the prejudice as the government's refusal to discuss a plea agreement with Kravit on behalf of petitioner during the attorney's investigation; making the attorney a potential defense witness at petitioner's trial; causing petitioner to hire a new lawyer; and delaying the proceedings. *Ibid.*

The district court concluded that, while dismissal of the indictment would be an excessive penalty, several counts of the indictment should be "pruned." Pet. App. 42a. The court picked the RICO count because it was the most costly and time-consuming to defend, and the tax counts because the government could recoup its tax losses in a civil proceeding. *Id.* at 6a.

The court of appeals reversed.[2] Pet. App. 1a-13a. The court ruled that petitioner's rights were not violated by the government's two-year investigation of both petitioner and his lawyer. The court found nothing indicating that the preindictment delay would impede peti-

---

statute of limitations grounds. Pet. App. 41a. Those dismissals were not appealed, and the counts underlying them are no longer at issue.

[2] The court of appeals also dismissed, for want of jurisdiction, petitioner's cross-appeal requesting dismissal of the entire indictment. Pet. App. 6a. That cross-appeal is not at issue here.

tioner's defense, and pointed out that the right to counsel does not attach until adversary judicial proceedings have begun. *Id.* at 8a-11a.

The court noted that "[i]n no previous appellate case has an investigation of a defendant's lawyer that ended before the trial began been held to interfere with the client's Sixth Amendment rights, let alone an investigation that exonerated the lawyer." Pet. App. 10a. The court continued that "[e]ven if the criminal investigation of Kravit had invaded an interest that the Sixth Amendment protects, there would be a question whether a criminal investigation of a lawyer that is conducted in good faith can ever invade the Sixth Amendment rights of the lawyer's clients." *Id.* at 10a-11a.

Because petitioner's rights were not violated and his defense was not prejudiced, the court of appeals found no basis for imposing a sanction that was tantamount to an acquittal by arbitrarily striking counts of the indictment. In the court's view, the trial judge's ruling was also premature because the time to assess an illegal interference with the right to counsel is after trial. Pet. App. 11a-13a.

2. Petitioner contends (Pet. 11-22) that the prosecutor's preindictment criminal investigation of his attorney violated due process and his right to counsel under the Fifth and Sixth Amendments, and that the district court's dismissal of the 13 counts of the indictment was an appropriate sanction. The court of appeals' decision places petitioner in precisely the same position he would have occupied if the district court had denied his motion to dismiss. If petitioner is acquitted following a trial on the merits, his contentions will be moot. If, on the other hand, petitioner is convicted and his conviction is affirmed on appeal, he will then be able to present his contentions to this Court, together with any other claims he

may have, in a petition for a writ of certiorari seeking review of a final judgment against him. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

DREW S. DAYS, III
Solicitor General

MAY 1994

---

[3] Because this case is interlocutory, we are not responding on the merits to the question presented by the petition. We will file a response on the merits if the Court requests.